Office of the Employer Adviser

PRELIMINARY RESPONSE
TO THE

WORKERS' COMPENSATION BOARD'S
DISCUSSION PAPER
ON THE
SECOND INJURY AND ENHANCEMENT FUND
JANUARY 1990

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Ministry of Labour
Ontario

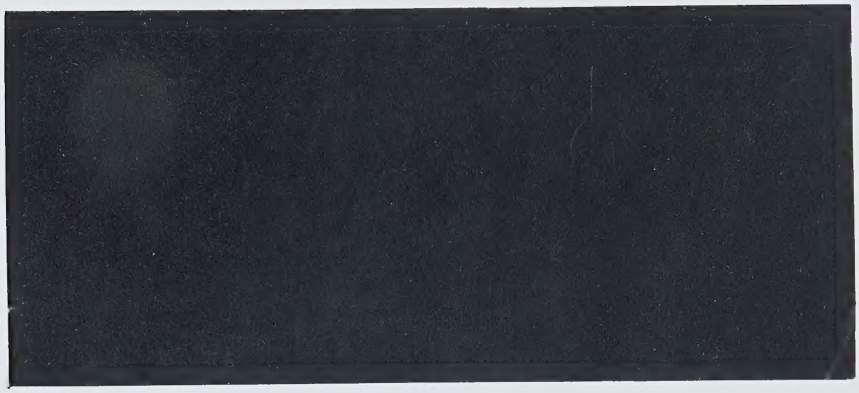

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TABLE OF CONTENTS

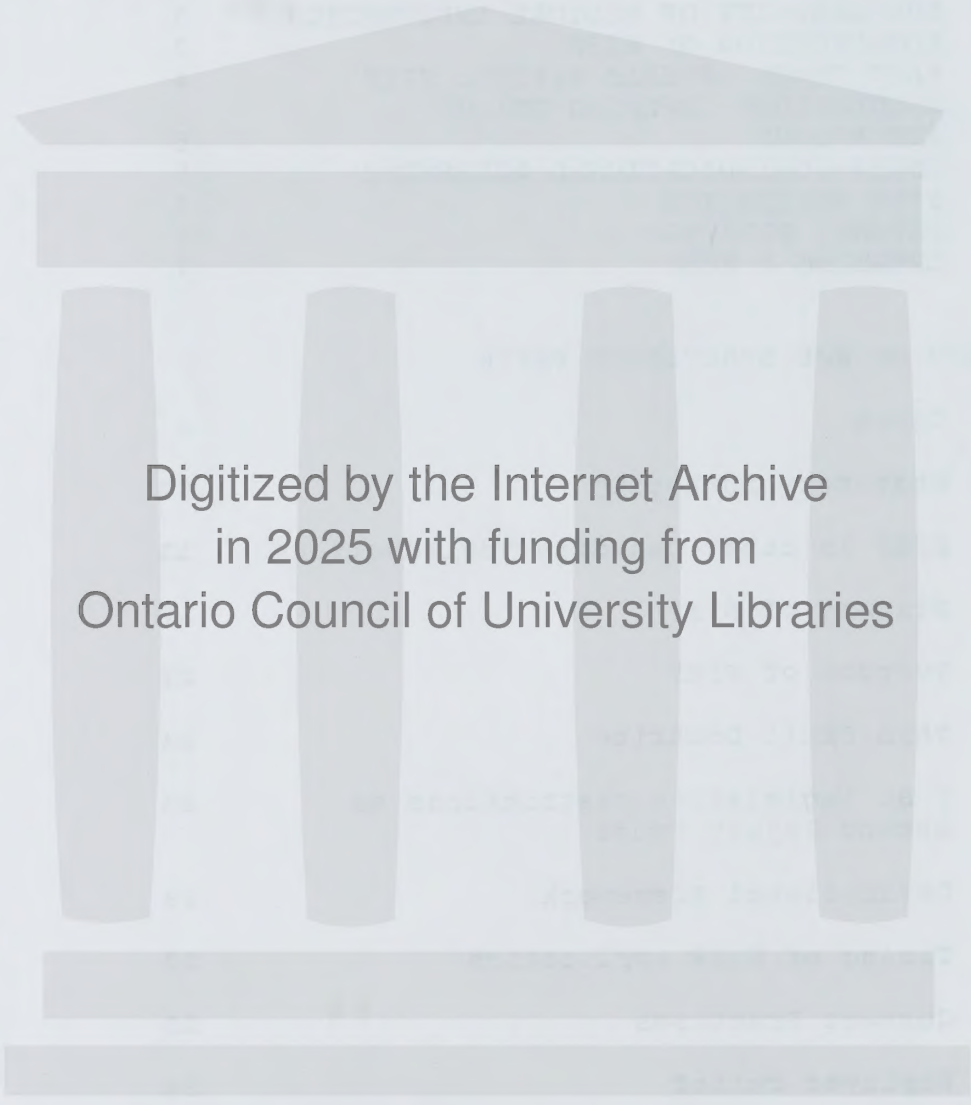
I. INTRODUCTION

II. OEA RECOMMENDATIONS

CODIFICATION	1
EXPERIENCE RATING	2
RETURNING INJURED WORKERS TO THE WORKPLACE	2
AVAILABILITY OF MEDICAL INFORMATION	3
ADJUDICATION OF SIEF	3
FAST TRACK APPEALS SYSTEM: SIEF	4
REGULATIONS COVERING UNIQUE SITUATIONS	5
INTER-JURISDICATIONAL AGREEMENT	5
SIEF STATISTICS	6
REVENUE STRATEGY	7
CREATING A FUND	7

III. REVIEW OF WCB DISCUSSION PAPER

1.	Issue	8
2.	Statutory Authority	10
3.	SIEF in other Canadian jurisdictions	13
4.	History of SIEF	17
5.	Purpose of SIEF	22
6.	Thin Skull Doctrine	24
7.	U.S. legislative restrictions on Second Injury Funds	26
8.	Definitional Framework	29
9.	Timing of SIEF application	30
10.	Current Practises	33
11.	Employer relief	34
12.	Worker benefits	37
13.	Pre-existing psychological conditions	40
14.	WCAT approach	42
15.	The 1990's context	46



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16. Vocational rehabilitation programs 52

17. Ontario Human Rights Code 55

18. Experience Rating and SIEF 56

19. Revenue Strategy 58

20. Financing of SIEF 59

21. Section 122(8) 61

22. Consultation 62

IV. DRAFT PROCEDURES POLICY ON SIEF 63

V. APPENDIX A - CANADIAN JURISDICTIONS REVIEW

APPENDIX B - HISTORY OF SIEF IN ONTARIO

APPENDIX C - APPLICATION OF EMPLOYER COSTS

APPENDIX D - WCAT SIEF CASES DATA

APPENDIX E - EMPLOYER SUCCESS RATES AT WCAT ON SIEF CASES

APPENDIX F - CLAIMS ADJUDICATION BRANCH PROCEDURE MANUAL ON SIEF

APPENDIX G - WCB DIRECTIVES ON THE ADJUDICATION OF SIEF

APPENDIX H - VOCATIONAL REHABILITATION POLICY ON SIEF

INTRODUCTION

The Office of the Employer Adviser has reviewed the Workers' Compensation Board's Discussion Paper on the Second Injury and Enhancement Fund.

This document presents positive recommendations for the betterment of the Second Injury and Enhancement Fund and for the system in general. Further, this document reviews in detail the comments and conclusions the Board has reached in it's discussion paper and outlines where further study should be undertaken.

The Office of the Employer Adviser believes that the Board's policy on the Second Injury and Enhancement Fund is under careful review. This fund is an integral component of the Workers' Compensation System and should be maintained. Removal of the fund will have serious and dramatic consequences.

I encourage all concerned to review and research this issue and consider making your observations or recommendations known to the Board. If our office can be of any assistance please contact us.

Jason E. Mandlowitz,
Director

OEA RECOMMENDATIONS

1. CODIFICATION

The OEA recommends that the Second Injury and Enhancement Fund be established directly in the statute to codify Ontario's approach to the treatment of pre-existing conditions and post-accident conditions.

The WCB has used Section 101(2) prior to October 1983 and, since then, has used Section 108(2) of the Workers' Compensation Act as legislative direction for the establishment of the Second Injury and Enhancement Fund. The new section proposed by the OEA would require an amendment to the Workers' Compensation Act. This section should be side noted as Second Injury Relief Fund and could appeal as Section 46(3):

46(3)(i) A Second Injury Relief Fund shall be provided in order to grant partial or total relief to employers in the classes or groups of industries for the time being included in Schedule 1 where there exists the presence of any condition pre-existing the industrial accident and/or occupational disease having influence on the extent of entitlement granted to an injured employee.

46(3)(ii) The Board shall establish upon initial adjudication those pre-existing conditions in evidence and the just employer liability.

46(3)(iii) Pre-existing the industrial accident and/or occupational disease will have regard for conditions which have produced periods of disability prior to the establishment of a compensable condition in addition to underlying asymptomatic conditions which become manifest following the establishment of a compensable condition.

2. Experience Rating

SIEF relief is an integral part of the experience rating system. This is a system which has been supported and expanded by the Workers' Compensation Board. Underlying this system is the concept that employers should be penalized only in regard to accidents and injuries that are related to the workplace. Employers should be entitled to relief from medical conditions they have not directly caused and over which they have no direct control.

Experience Rating programs must be adjusted to allow for full application and consideration of the quantum of SIEF relief granted an employer. The effect of this change would deliver to an employer adjustments in Experience Rating calculations as the Board makes decisions rather than awaiting a decision on relief beyond the applicable inclusion dates of Experience Rating.

The OEA further recommends that Experience Rating programs produce regular summaries clearly outlining the amount of SIEF granted and the full comprehensible mathematical calculation and formula.

3. Returning Injured Workers to the Workplace

The OEA believes that the Workers' Compensation Amendment Act (Bill 162) will usher in an era in which there will be better co-operation between the Workers' Compensation Board, management and workers. In this spirit, a greater number of injured workers will be returned to the workplace. It would seem that an employer will have greater exposure to new accidents and recurrences in the workplace.

It is imperative, in the context of this co-operative spirit, that the employer have recourse to relief in regard to medical conditions noted in the Draft Claims Adjudication Branch Procedure on pages 63 - 64. (Temporary Disability, point 4).

4. Availability of Medical Information

The OEA recommends that WCB adjudicators and investigators request medical history and medical documentation from every worker requesting WCB benefits of any kind. This is consistent with the practise used by private insurance carriers for disability related claims.

Adjudicators would require treating medical practitioners to provide updated information on all conditions which he or she is providing to the injured worker regardless of compensability.

5. Adjudication of SIEF

The OEA recommends that, with respect to SIEF, there be regulations, adjusted over time as necessary, to recognize the changing nature of the definition of accidents and injuries and the adjudication and investigation of such. Further, that adjudicators and investigators receive specific training in regard to the application of SIEF relief.

Adjudicators would be expected to automatically assess for SIEF once a claim has become prolonged. In obvious cases the adjudicator should have the ability to grant initial SIEF at a level greater than or less than 50%. This will provide for a more sensitive regard to the application of SIEF and administration of Experience Rating programs.

Adjudicators must also be empowered to provide SIEF to all benefits in a claim including medical aid, temporary benefits and pensions. Any exceptions to this rule would have to be explained in writing to the employer.

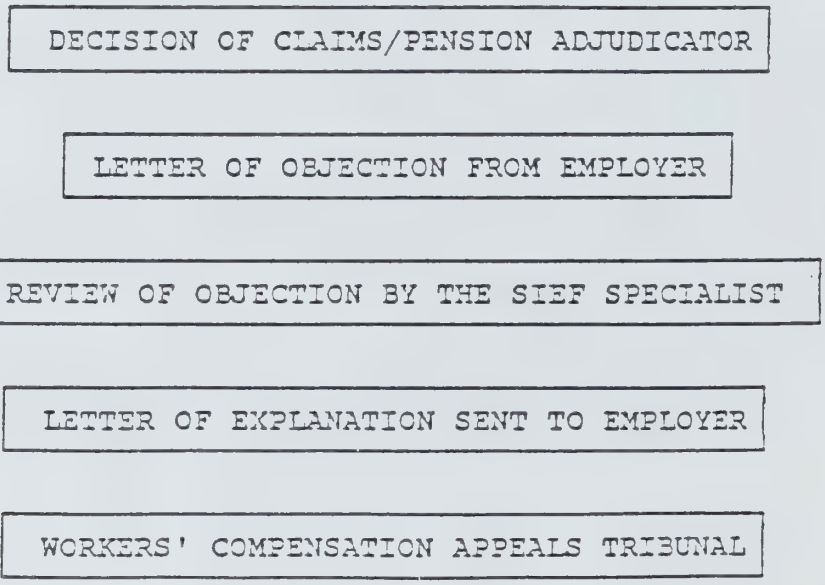
In order to administer this policy in a just and fair manner, all branches and levels of the Board must be bound to the quantum of SIEF given. Further, current problems surrounding the lack of uniformity in the application of SIEF policy must be corrected.

6. Fast Track Appeals System: SIEF

The OEA has been an advocate for the provision of specially trained staff in matters affecting SIEF application. This new SIEF system would function as follows:

- Elimination of the Decision Review Branch/Review Services Division;
- Provision of new SIEF Specialists who would make decisions on employer objections;
- SIEF Specialists would have the status of a Hearings Officer;
- SIEF appeals would begin with a letter of objection to the SIEF Specialist after the adjudicator has rendered a decision;
- A written decision would be rendered by the Specialist and forwarded to the employer;
- These decisions would then be directly appealed to the Workers' Compensation Appeals Tribunal.

The chart below outlines the new process:


DECISION OF CLAIMS/PENSION ADJUDICATOR
LETTER OF OBJECTION FROM EMPLOYER
REVIEW OF OBJECTION BY THE SIEF SPECIALIST
LETTER OF EXPLANATION SENT TO EMPLOYER
WORKERS' COMPENSATION APPEALS TRIBUNAL

The OEA recommends that the Workers' Compensation Appeals Tribunal institute an appeal by letter unless an oral hearing is requested.

It is the purpose of this fast track system to dispose of applications in a more timely and direct manner. This should also restrict administrative impact and avoid unnecessary costs.

7. Regulations Covering Unique Situations

The OEA recommends regulations be prepared to cover unique accident and injury situations. Though not an exhaustive list, these would include:

a. In cases of chronic pain where little provable organic findings are made, coupled with emotional non-compensable factors, the initial SIEF relief would be 75%;

b. In cases of psychological and psychogenic conditions, a similar provision to the above be made;

c. That the distinction between recurrence and new accident be waived in regard to workers returned to the workplace under Bill 162; and

d. That 100% SIEF relief be granted to an employer in regard to the costs in adapting the workplace to accommodate a worker under Bill 162.

8. Inter-Jurisdictional Agreement

The OEA recommends that the Ontario Board amend the Inter-Jurisdictional Agreements in order to gain the authority to collect funds from eleven other Workers' Compensation Boards in Canada.

Those workers who have been granted entitlement in other provinces or territories and suffer a new accident or recurrence compensated by the Ontario WCB would be compensated by the Board and those costs would be transferred to the other WCB. The Ontario employer would be given the appropriate SIEF relief charged back to the appropriate Board and accident employer.

The WCB issue statement communicated a dramatic increase in SIEF transfers from 1975 to 1989. However, the OEA is concerned by the presentation of this data separate from a useful critical analysis. We submit that the discussion paper's use of transfer statistics may lead to a false conclusion. That is: employers have accessed the SIEF for the wrong reasons and, therefore, the SIEF should be contracted.

The WCB description details increases which seem to demonstrate the use of SIEF has increased dramatically. This lends credence to the theory that something must be done in order to control the amount of relief given or to eliminate the SIEF completely. In reality, the use of SIEF has increased due to the following:

a. The total number of employers covered under Schedule 1 has increased by 33,000 from 1985 to 1988;

b. The maximum assessable earnings ceiling has increased allowing for higher benefit payments as well as higher assessment premiums; and

c. Adjudication error in allowing benefits to workers for conditions which were not compensable or impacted upon a compensable condition.

9. SIEF Statistics

The OEA recommends that the WCB compiles and maintains up to date statistical information regarding the use of SIEF as it applies to the placement in employment of injured workers.

10. Revenue Strategy

The OEA recommends that due to the important interface between SIEF and WCB revenue policies that these matters be considered as a whole. That is: the SIEF issue cannot be divorced from the WCB Revenue Strategy or any review of the WCB funding system.

11. Creating a Fund

The OEA has reviewed SIEF in light of the current actuarial approach and, as an alternative, the establishment of a pool of capital. The OEA recommends that the WCB investigate and report on these options.

DISCUSSION PAPER

THE APPLICATION OF THE SECOND INJURY AND ENHANCEMENT FUND

I. ISSUE

Many concerns have recently been expressed about the Workers' Compensation Board's (the "Board's") Second Injury and Enhancement Fund (SIEF). Among these concerns, two themes predominate. First, during recent assessment rate meetings employers have expressed concern respecting the escalating use of SIEF. Cost transfers from individual employer accounts to SIEF increased from $18.3 million in 1975 to $167.6 million in 1986. Each year since then, the amount of cost relief has continued to escalate. In 1987, transfers to SIEF reached $218.2 million. In 1988, SIEF transfers totaled $230.1 million. This amount was already surpassed by October 1989 with a total of $263.4 million. The projected amount of SIEF transfers for 1989 is about $300 million.

A second theme that has emerged is whether the underlying social goal of SIEF, the re-employment of injured workers who might otherwise experience difficulty securing employment, is being achieved. There is concern that the more than $250 million in SIEF transfers is not actually reflective of success in returning injured workers to employment but rather reflects the use of this fund as a cost cutting measure by some employers.

As a first step in addressing these two primary concerns, as well as other issues relevant to SIEF policy, this discussion paper has been developed for consideration by the Board's stakeholders. The Board is very interested in receiving the views of all concerned parties respecting the issues that are highlighted in this paper.

OEA RESPONSE

The WCB issue statement communicated a dramatic increase in SIEF transfers from 1975 to 1989. However, the OEA is concerned by the presentation of this data separate from a useful critical analysis. We submit that the discussion paper's use of transfer statistics may lead to a false conclusion. That is: employers have been allowed to access the SIEF for the wrong reasons by the adjudication system and, therefore, the SIEF should be restricted.

The WCB description details increases which seem to demonstrate that the use of SIEF has increased dramatically. This lends credence to the suggestion that something must be done in order to control the amount of relief given or to eliminate the SIEF completely. In reality the use of SIEF has increased due to the following:

a. The total number of employers covered under schedule 1 has increased by 33,000 from 1985 to 1988;

b. The maximum assessable earnings ceiling has increased allowing for higher benefit payments as well as higher assessment premiums;

c. Adjudication liberalization in granting benefits to workers for claims which, at best, are tenuously linked to employment; and

d. Benefit claims granting SIEF relief which had been denied at previous levels of adjudication.

1. Statutory authority

Section 108(2) of the Workers' Compensation Act (the "Act") has been used as the legislative authority for SIEF. This section states that:

> The Board, where it considers proper, may add to the assessment for any class or classes or for all the classes in Schedule 1 a percentage or sum for the purpose of raising a special fund to be laid aside and used to meet the loss arising from any disaster or other circumstance that, in the opinion of the Board, would unfairly burden the employers in any class.

In determining whether this section does indeed provide statutory authority for SIEF, the focus is on the words "any disaster or other circumstance, that in the opinion of the Board, would unfairly burden the employers in any class".

It is a fundamental principle of statutory interpretation that the words of a statute derive their "colour" from the other words that surround them. Where a specific word like "disaster" is followed by a general term such as "other circumstance", the general term should be interpreted in reference to the specific term.

Thus in terms of the authority conferred by this section for SIEF, the question is whether claim costs related to a worker's previous disability would be considered a circumstance akin to a disaster. Given the unlikelihood that prior disability and disaster would be considered similar in nature, this rule of statutory interpretation casts doubt on the legal authority under s.108(2) for a mechanism such as SIEF.

Additionally, the current SIEF policy provides for cost relief to individual employers in situations in which a worker's disability has been enhanced by a pre-existing condition. Section 108(2) contemplates that all employers in a particular class must be effected before the fund can be utilized.

Although s.108(2) may not be legal authority for the SIEF policy in its current form, it could be argued that elements of the current program, including cost relief for second accidents, are authorized by the parts of the Act which permit experience rating and penalty assessment.

The OEA submits that the Board has sufficient authority to establish an SIEF. The OEA, in its submission to the Standing Committee on Resources Development in May 1988, suggested the following:

> Second Injury and enhancement Fund
>
> The WCB pursuant to Claims Services Division Manual, pages 171 to 175b and Exhibit #1 - Table-Application to the Employee Award - has established a policy on pre-existing conditions. By reference, the relevant section of the Act is Section 108(2).
>
> We recommend a Second Injury provision be established directly in the statute to codify Ontario's approach to treatment of pre-existing condition situations.
>
> This would require an addition to the Act. The new section should be side noted as Second Injury Relief Fund and could appear as Section 46(3).
>
> 46(3)(i) A Second Injury Relief Fund shall be provided in order to grant partial or total relief to employers in the classes or groups of industries for the time being included in Schedule 1 where there exists the presence of any condition pre-existing the industrial accident and/or occupational disease having influence on the extent of entitlement granted to an injured employee.
>
> 46(3)(ii) The Board shall establish upon initial adjudication those pre-existing conditions in evidence and the just employer liability.

46(3)(iii) Pre-existing the industrial accident and/or occupational disease will have regard for conditions which have produced periods of disability prior to the establishment of a compensable condition in addition to underlying asymptomatic conditions which become manifest following the establishment of a compensable condition.

Board policy on a Second Injury Relief Fund should be developed in consultation with the employer community in Schedule 1.

2. SIEF in other Canadian jurisdictions

In reviewing the use of SIEF in other Canadian jurisdictions two key issues emerge. The first issue is the statutory authority to relieve employers of the costs associated with enhanced disabilities. The second issue is the nature and extent of SIEF use. The statutory provisions found in other provincial acts is provided in Appendix A.

In terms of the issue of statutory authority some provincial Boards rely on sections very similar to s.108(2) for authority to develop an SIEF policy. Many other Boards, in addition to the provision for a disaster fund found in s. 108(2), have an explicit statutory provision for an SIEF policy. For example, the legislation in Newfoundland, Quebec, Manitoba, British Columbia and the Yukon specifically provides for a special reserve fund for payment of claim costs related to enhanced disabilities because of similar or other disabilities previously suffered.

There is also a wide range in terms of the nature and extent of SIEF use across Canada. The data available for Newfoundland reveals that SIEF transfers in 1986 were $413,153. In 1987 they increased to $481,542. In 1988 a further increase to $532,491 was recorded. Newfoundland, currently phasing in an Experience Rating program, may review SIEF policy after complete implementation.

Second Injury Fund requests in Saskatchewan have increased noticeably since a "surcharge program" to penalize poor performers was initiated in 1986-87. Transfers to SIEF in 1985 totaled $1.73 million. In 1988, $2.3 million was transferred to SIEF.

In Alberta, SIEF relief is applicable following 8 weeks of temporary total benefits. A recent trend is to allow recurrences as new claims and then transfer a portion of costs to SIEF. Originally, SIEF was applied only in claims with back injuries but in recent years SIEF has been applied more liberally. A review of SIEF and allowance on an aggravation basis policies is being considered.

According to the 1988 British Columbia Annual Report almost $16 million was deducted from the "enhancement reserve". The amount deducted in 1985 was $7.9 million. It was suggested that a possible reason for the increase may be a policy change that requires adjudicators to consider SIEF at a 13 week review rather than at the request of the employer as had been previous practice.

Annual reports from Manitoba showed that transfers to the "enhancement reserve" totaled $4.7 million in 1983 but was only $4.2 million in 1987. The 1983 New Brunswick Annual Report indicated $580,000 was deducted from SIEF and that by 1988 this increased to $1.6 million.

OEA RESPONSE

While Section 108(2) is referred to as the legislative authority for SIEF, the WCB has also referred to Section 104(2) as legislative authority with respect to Pre-existing Conditions and SIEF. Section 104 states that:

ASSESSMENTS

Assessments, levying

104.—(1) The Board shall in every year assess and levy upon the employers in each of the classes such percentage of payroll or such other rate or such specific sum as, allowing for any surplus or deficit in the class, it deems sufficient to pay the compensation during the current year in respect of injuries to workers in the industries within the class, and to provide and pay the expenses of the Board in the administration of this Part for that year or so much thereof as may not be otherwise provided for, and also to maintain a reserve fund to pay the compensation payable in future years in respect of claims in that class for accidents happening in that year, of such an amount as the Board considers necessary to prevent the employers in future years from being unduly or unfairly burdened with payments that are to be made in those years in respect of accidents that have previously happened. R.S.O. 1980, c. 539, s. 104 (1); 1982, c. 61, s. 2.

Provisional levy

(2) Such assessments, if the Board sees fit, may be levied provisionally upon the estimate of payroll given by the employer or upon an estimate fixed by the Board and, after the actual payroll has been ascertained, may be adjusted to the correct amount, and the payment of assessments, if the Board sees fit, may be divided into instalments. R.S.O. 1980, c. 539, s. 104 (2).

The Board used Section 102(2) as the legislative authority for SIEF as is cited in the Claims Adjudication Branch Procedures document 33 02 20, inclusive. This document was amended in October 1983 using Section 108(2) of the Workers' Compensation Act.

The discussion paper seems to suggest that there is no legislative authority for a SIEF. Clearly, Section 104(1) makes provision for a reserve fund as does Section 108(2). The WCAT, in Decisions 57/87 and 425, has suggested that SIEF may be obtained through the use of Sections 122(4), 122(5) and 122(8).

The discussion paper suggests that Section 108(2) not be used because of a reference to "disaster" followed by "other circumstance". The Board would not suggest that each and every policy and procedure it uses to administer the system is covered specifically by a section of the Act. Section 108(2) makes provision for "other circumstances". Prior to 1983, the Board was content in using Section 104(2).

OEA RESPONSE

The discussion paper gives the impression that the prime issue surrounding the review of SIEF is future elimination or restriction of the policy. Further, data and commentary from other provinces are provided in support of the prime issue.

The discussion paper provides data on several Canadian provinces. For Newfoundland, the discussion paper sites a "dramatic increase in the use of SIEF in Newfoundland". We contend that the use of this statistical information is misleading. The Workers' Compensation Commission Newfoundland and Labrador had as its objective a "fully funded position at the end of each calendar year. Newfoundland is reviewing its position to ensure that the reserve fund is maintained in such a way so as not to jeopardize the objective. OEA consultations with the Commission concludes that the increases in SIEF as reported in the discussion paper, reflects an increase in the number of employers covered, an increase in earnings ceilings and greater usage as employers in the province are made aware of the fund.

OEA consultations with the Workers' Compensation Board of Alberta bear directly on the discussion paper. We are troubled by the differences between the discussion paper and the results of our consultation. For example:

a) The discussion paper claims that the Alberta WCB applied SIEF relief following eight weeks of temporary total benefits while the Alberta Board responded to the OEA by stating that SIEF is applicable following eight weeks of any type of benefits;

b) The discussion paper claims that a recent trend in Alberta is to allow recurrences as new claims and then transfer a portion of those costs to the SIEF while Alberta responds by stating that there has not been any recent trend to do what the Workers' Compensation of Ontario is suggesting. Alberta contends that there may be transfers of this type in very rare circumstances. It is absolutely not done as a practice;

c) The discussion paper claims that Alberta originally intended the SIEF to apply only in claims with back injuries but in recent years has expanded its application, while the Alberta response to the OEA clearly demonstrates that the Alberta Board, since 1975 has applied SIEF to cardiac claims, epilepsy, hearing loss, respiratory disease, second injuries, rehabilitation surgery, delayed recovery claims, and the negligence of another employer; and

d) The discussion paper claims that the Alberta Board is currently reviewing the application of SIEF and is considering a policy where SIEF will only be granted to employers on an aggravation basis. The Alberta Board informed the OEA that all of its present policies referring to all matters in the purview of the Workers' Compensation Board of Alberta are under review.

3. History

The following is a brief historical perspective of SIEF. A comprehensive history is contained in Appendix B.

In 1915, s.88(2) [now s.108(2)] was added to the Act to provide authority to establish a special fund named the Disaster Reserve Fund. This section made provision to distribute a loss, resulting from a disaster, that would unfairly burden a class over all the classes.

In 1925, costs were first transferred to the Fund for the purpose of second injury relief. The 1926 Annual Report explained this use of the Fund as a reflection of the Board's concern respecting injured workers who may encounter discrimination in the labour market because of previous loss of an eye or a limb.

A Board order dated October 30, 1942 provided for the transfer of the capitalized value of a multiple factor to the Disaster Reserve. A December 27, 1945 Board order established the Second Injury Fund as separate from the Disaster Reserve Fund. It was to be considered only in those cases where an award for permanent partial disability was increased by reason of a previous permanent disability.

Board orders of March 25, and May 8, 1970, initiated major changes to SIEF. These primarily included 50% cost relief on costs for

temporary disability and medical aid, as well as for claims involving neurosis and psychoneurosis. Additionally, cost relief was given in hearing loss cases with the amount of the transfer dependent on whether a pre-employment audiometric test had been conducted.

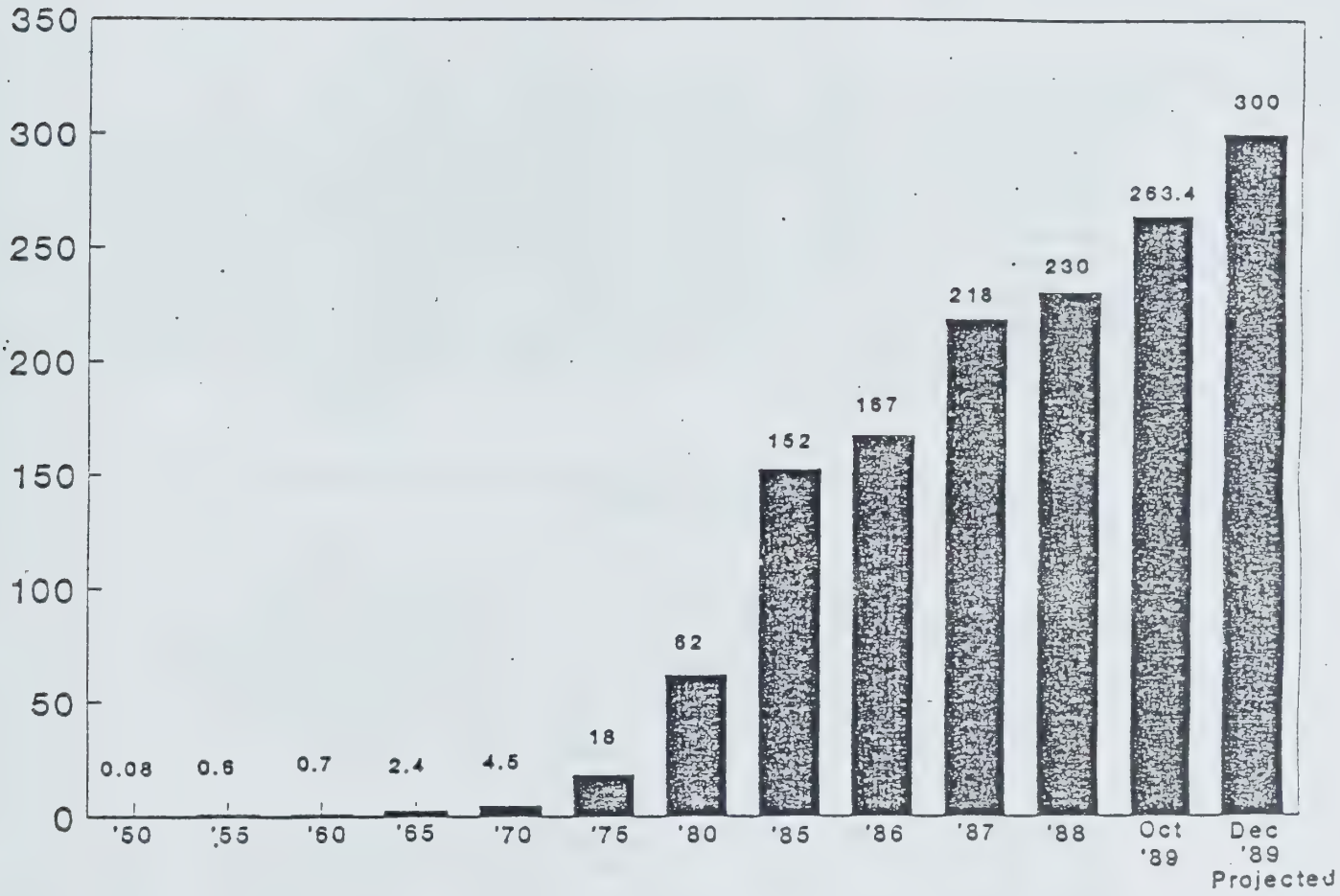
A policy change approved November 3, 1978 provided a more detailed means of determining employer cost relief by assessing the severity of the accident in relation to the severity of the pre-existing condition (Appendix C). In a Board order dated April 8, 1980, no lost time claims became eligible for SIEF relief.

This evolution of SIEF policy is reflected in the escalation of the number and dollar amount of cost transfers over time. As the boundaries for SIEF were widened, there was a corresponding increase in utilization. This dramatic escalation in use is evident from the following description of cost transfers:

TOTAL $ TRANSFERS TO SIEF

1950 TO 1989

(In Millions $)



This graph illustrates that the use of SIEF has not only escalated gradually over many decades but, that during recent years, use has significantly escalated on an annual basis. Possible explanations of its increasing use in recent years are: the inception of NEER and CAD-7 as part of the Experience Rating program in 1984, the emergence of employer advocates during the 1980's, and the 1987 change in the net discount rate for the Board's published liabilities, applied to January 1986. This actuarial change led to a significant increase ir the capitalized values of pensions and in addition to increasing numbers of pensions has thus increased the amount of SIEF transfers.

OEA RESPONSE

The discussion paper questions the establishment of an SIEF, since it believes that there is not legislative authority to permit such, yet it acknowledges that since December 27, 1945, a Board order provided the distinction between the Disaster Reserve and the SIEF. While the SIEF practice began in 1945, it appears strange that the Board would, in 1990, contend that it does not have the legislative authority to establish such a fund that has existed for some 45 years.

While the Disaster Fund was used for the purposes of SIEF, the 1926 annual report states:

> "The Board ... has been trying out during the year, the policy of charging against the class any individual employer in such cases only the percentage of disability which would be awarded for the injury actually done in such employment to an unnamed man, and charge against this Disaster Fund the remaining cost of such disability case." (Appendix B).

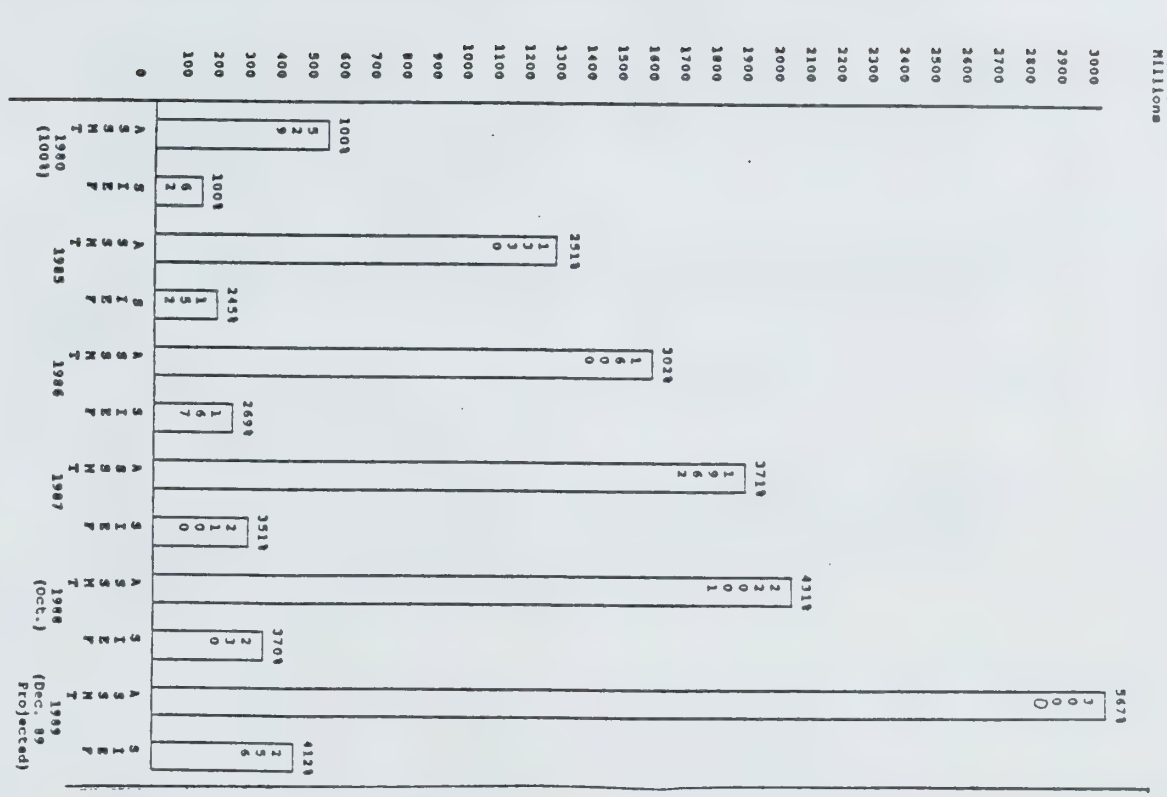
Historically, the Board has advanced the fund to provide for the conditions which qualify for relief today. The "evolution" of SIEF is not, however, reflected in the Total Dollars Transfers to SIEF graph, included in the discussion paper. The discussion paper does not take into account those factors outlined in Section 1:

a) Total number of employers covered under Schedule 1 has increased by 33,000 from 1985 to 1988;

b) The maximum assessable earnings ceiling has increased allowing for higher benefit payments as well as higher assessment premiums;

c) Adjudication liberalization in granting benefits to workers for claims which, at best, are tenuously linked to employment; and

d) Appeal decisions allowing SIEF where it was denied at the adjudication level in error. Further, the increases in SIEF do not appear out of order when compared to the growth in revenue. According to the following graph, SIEF transfers did not increase greater than the amount of assessment collected. It is also noteworthy that over this same period, the percentage growth in claims benefit pay-outs and claim costs for the Workers' Compensation Board exceeded the increase in assessment revenue. (Peat Marwick KPMG Study 1986.)



Statistics obtained from the Workers' Compensation Board of Ontario.

4. Purpose of SIEF

The purpose of SIEF is:

- To encourage employers to employ disabled workers who might otherwise have difficulty securing employment by reducing the employers' financial risk.

SIEF has been used to shield individual employers from all or a portion of the accident costs of a claim where a pre-existing condition or disability is either aggravated by a compensable injury or causes, prolongs, or enhances a compensable injury. This limitation on employer costs is designed to remove the financial disincentive to hire workers who may be perceived to be at higher risk of having accidents or aggravating pre-existing conditions.

OEA RESPONSE

In addition to the purpose stated in the discussion paper, Claims Adjudication Branch manual 33 28 01 lists the following as justification for an SIEF:

- If a prior disability caused or contributed to the compensable accident or if the period of disability resulting from an accident becomes prolonged or enhanced due to a pre-existing condition, all or part of the compensation or medical aid costs may be transferred from the accident employer in Schedule 1 to the SIEF;

- Industrial Hearing Loss;

- Vibration induced whitefinger disease; where non-compensable conditions have caused an accident;

- Cost of benefits and treatments for a non-compensable condition which may reduce the cost of the eventual permanent disability award; and psychological disabilities impeding treatment and deemed non-compensable.

The WCB policy clearly exceeds the statement of the purpose of SIEF in the discussion paper acknowledging the need to adapt the 1915 statute to new situations in the workplace.

For the OEA a central question left unresolved and missing from the discussion paper is:

> should a worker's compensation system funded by employers, compensate workers for conditions unrelated to the workplace or to the purpose of the Workers' Compensation Board?

5. Thin Skull Doctrine

A general principle of workers' compensation law that has been adopted in Ontario is that the system and, by implication, employers take their workers as they find them. This is commonly referred to as the "thin skull doctrine". Through this concept of legal liability, when an employer has financial accountability for a claim, all costs related to that claim are assigned to that employer.

However, there is a general view in the employer community that employers should not be required to pay the costs associated with a worker's accumulated medical history. As a result, SIEF has been used to provide protection from these costs and is thus construed as a fairness measure. The reallocation of costs in this way raises questions respecting the compatibility among the "thin skull doctrine", SIEF and experience rating. A more comprehensive discussion regarding the relationship of the latter two is found on page 14.

OEA RESPONSE

Employers generally hold that they take their workers as they find them, but if the worker was previously injured, they do not accept the Board paying a worker for conditions which pre-date the injury or which impair the worker's recovery.

Moreover, employers feel that the Ontario Human Rights Code limits or prohibits their ability to enquire into a worker's medical history.They are not able to monitor or prevent possible recurrences to pre-existing conditions since workers do not have to declare prior conditions as in many U.S. jurisdictions. If an employer is not aware that a worker suffers from recurring back pain and requires, as part of the job function, that the worker lifts objects, the employer will not be aware that the worker is susceptible to possible injury.

Employers do not feel that they should be subject to the full cost of such a claim. SIEF has, in the past, attempted to remedy this type of situation.

6. U.S. legislative restrictions on Second Injury Funds

About one third of the states that have an SIEF provision limit the application of SIEF to combined results that are permanent and total. SIEF cannot be applied to the claim even if the combination of the two injuries results in 90% disability.

Many jurisdictions also specify the timing of SIEF relief through statutory provisions that prohibit the application of SIEF to a claim until it has surpassed 104 weeks. Cost relief is thereby restricted to claims of extended duration.

Another aspect of the U.S. experience centers around the question, should it be necessary for the employer to be aware of the pre-existing condition in order to qualify for cost relief? One view is that employers must have knowledge of the employee's impairment and a good faith belief in its permanency. This is based on the reasoning that if the disability were unknown, it would not create a barrier to employment and the Fund would not serve to encourage employment.

Another approach rejects the requirement of employer knowledge. For example, the California courts have ruled that the previous disability need never have manifested itself, even to the worker.

OEA RESPONSE

As the discussion paper outlines, some American states require the employer to be aware of a non-compensable injury. States such as Georgia, Alabama, South Carolina, Rhode Island, Kansas, Nevada, and Arizona require the employer to have a record of the pre-existing disability. Each Board allows for the filing of the condition prior to any claims being made. If the worker does not disclose or is not aware of the condition, the employer may be exempted from this provision.

In Ferguson vs California Industrial Accident Commission, 50 Cal. 2D 469, 326P the Commission's denial was based on the lack of employer knowledge. The decision indicated the essential test was whether the prior impairment was labour-disabling: whether, if industrial, it would be independently capable of supporting an award (Richard A. Wahl, Roberts and Plunkett, 100 Newport Avenue, North Quincy, MA).

The SIEF in California pays the difference due the worker and the permanent non-compensable disability. While it does not require the employer to have knowledge of any prior disability, nor does the worker need to be aware, the California Board will, upon proof that there is a pre-existing disability, provide relief if the pre-existing disability results in 70% of the disabling condition and the second injury in 35% of the disabling condition.

The major difference between the United States and Canada with respect to apportionment and SIEF policy is the presence of Human Rights statutes and regulations and the information to which employers are entitled.

What precipitated the establishment of SIEF in many states was the rule of Apportionment. Where a pre-existing condition produces some level of disability or enhances the level of compensable disability, the worker may be responsible for part of his/her compensation cost. Apportionment still continues in states such as New Mexico, Hawaii, New York State and North Carolina.

Apart from special statute, a pardonable "disability" does not include a prior non-disabling or disease that contributes to the end result. Nothing is better established in compensation law than the rule that, when industry injury precipitates disability from a latent, prior condition, such as heart disease, cancer, back weakness and the like, the entire disability is compensable and ... no attempt is made to weigh the relative contribution of the accident and the pre-existing to the final disability or death. (Larson, the Law of Workmen's Compensation, Volume 2, Section 59.22 1933.)

Apportionment clearly presents barriers to employment and re-employment; however, this policy addresses the main concerns expressed by employers in that they do not want to be responsible for non-occupational physical or mental conditions. While apportionment does go a long way in sharing liability between worker and employer, it does not present difficulties to workers.

7. Definitional framework

Current Board policy differentiates between pre-accident disability and pre-existing condition. Pre-accident disability is defined as a condition which has produced periods of disability in the past requiring treatment and disrupting employment. Pre-existing condition is defined as an underlying or asymptomatic condition which only becomes manifest post-accident.

Within the context of SIEF, a second injury is defined as an injury which, combined with a pre-accident disability or a pre-existing condition, creates costs in excess of the normal costs for that injury. SIEF relief for claims prolonged or enhanced by a pre-existing condition is considered when it is recognized that the pre-existing condition is contributing to the claim costs.

Allowance on an aggravation basis refers to the acceptance of a condition, caused by a compensable incident, that is superimposed on a prior disability whether or not compensable. SIEF relief for claims allowed on this basis is considered at the time of initial adjudication.

SIEF DISCUSSION PAPER

OEA RESPONSE

No comment.

b. Timing of SIEF application

In current practice, once a decision is made that SIEF relief is in order, cost transfers are often applied to the claim from the date of the accident. While this approach is administratively simple, it does create some commonsense problems.

If a worker with a pre-existing condition has a second accident, it is reasonable to assume that from the date of accident to a certain time in the future, the disability is exclusively related to the second accident. However, once it is determined that the claim has become prolonged and cost relief is in order, the timing of the application of SIEF to a claim is imprecise.

Some employers may argue that many accidents are minor and therefore lost time after four weeks must be due to an underlying condition, or they declare that the accident, in and of itself, would have resulted in a no lost time claim but for the underlying or pre-existing condition. This however is no more precise in determining correct SIEF application.

OEA RESPONSE

The discussion paper gives the impression that WCB adjudicators follow procedure in addressing the application of SIEF. Employers regularly report to the OEA that the Claims Adjudicator involved in their case did not enquire into the past medical history of a worker. They do not, as a rule, check Board records to ensure that the worker does not have prior claims. Similarly, there is no system in Canada to check with other Boards as to the prior claims of workers. In practice, there are only three ways to learn about prior conditions:

1. Employer advises WCB of the specific physical/mental condition;

2. Worker informs WCB; and

3. Physicians inform WCB.

The WCB suggests it does have the power to request medical information which pre-dates a compensable injury. While employers in the system are aware of some adjudicators enquiring into past medical history, there is no requirement on adjudicators, prior to a decision being rendered, to obtain past medical history and current information on non-compensable medical conditions and there impact upon a compensable condition. The discussion paper suggests that the Board, as a matter of fact, is determining that cost relief is in order based on a pre-existing condition and expresses concerns that "the timing of the application of SIEF to a claim is imprecise".

The argument from employers is that many accidents appear minor based on the amount of time lost and that the overall lost time could have been reduced had it not been for a pre-existing condition. Employers, utilizing this theory, believe that Adjudicators should review this type of claim when the time-loss is not compatible with acceptable limits established by the medical community.

What is overlooked in this section of the discussion paper are the reasons for such an argument. While employers would agree that this method lacks precision in determining "correct SIEF application", they are attempting to bring a legitimate concern to the Board's attention. Employers are told by respected members of the medical community that serious back injuries, for example, should take no more than six weeks to repair. While an employer finds that the worker has been off work for three months due to a minor back injury, he/she may suggest to the Board that there might be a pre-existing condition prolonging recovery. The suggestion would not have to be made if adjudicators would have the time and opportunity to monitor claims closely, effectively and efficiently.

8. Current practice

a. References

SIEF policy is outlined in "Board Policies and Divisional Administrative Guidelines, Claim Services Division" at pages 235 - 245 pursuant to section 108(2). Directive 1 (April 13, 1982 Bd. M. 4959 #10) and (April 8, 1980 Bd. M. 4845 #13) and Directive 2 detail how SIEF is to be applied.

This policy is elaborated in "Claims Adjudication Branch Procedures Manual" by: Document # 33 28 01 "Basic Concepts"; Document # 33 28 03 "Permanent Disability"; and Document # 33 28 05 "Industrial Diseases". It is also explained in "Vocational Rehabilitation Division Manual" Document # 02-01-04 "Interpretation of Application of SIEF".

SIEF DISCUSSION PAPER

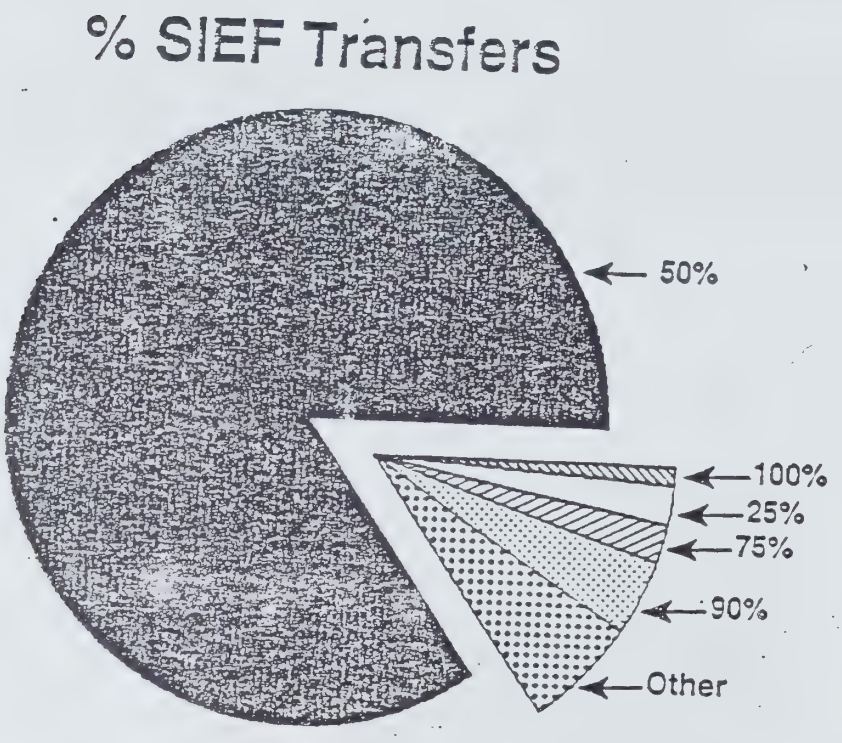
OEA RESPONSE

The references described above are reproduced and attached in Appendix F.

c. Employer relief

SIEF relief may be granted for pre-existing conditions or disabilities whether physical or psychological, compensable or non-compensable. In the majority of cases, 50% cost relief is given. In cases where the accident is caused by epileptic seizures or the malfunctioning of artificial appliances or where the accident occurs during a Board-sponsored job placement, training on the job, or assessment program, 100% relief is provided for all claim costs.

A survey of 1,114 SIEF transfers revealed that about 85% of SIEF transfers are for 50% cost relief. Only 1% are total claim cost or 100% transfers. The following pie graph illustrates the percentage of SIEF relief in this sample.



The extent of relief can be adjusted at the time of permanent disability assessment. This adjustment is made by evaluating the extent of a pre-existing condition and the severity of the accident and applying these evaluations to a matrix developed for SIEF application (see Appendix C). Adjustment in the percentage of SIEF relief is often applied retroactively to all claim costs.

An increase in employer cost relief at the time of permanent disability rating certainly can occur but a reduction in the percentage of cost relief is also possible. The rationale for such a downward adjustment in SIEF relief, sometimes two years after an accident, can be difficult to explain to an employer who has assumed that the original SIEF calculation will likely remain consistent throughout the duration of the claim.

Where the pre-existing condition is measurable, the enhancement of the disability is calculated by taking the value of the combined rating of the disabilities and subtracting the sum of the prior condition and the new condition. The remaining amount is called the enhancement factor and it is transferred to SIEF.

Anomalies in SIEF application can arise once entitlement has been established. It is possible for instance, that a non-compensable psychiatric disability could increase temporary benefit costs by prolonging recovery, yet not have any effect on permanent benefits. Thus SIEF would only be considered in relation to the temporary benefits. Conversely, SIEF may not be relevant for temporary benefit costs but can arise when an enhancement factor is identified at permanent disability assessment.

OEA RESPONSE

Employers report to the OEA that the Board routinely grants 50% SIEF relief in the majority of cases. There may be reason to grant a greater amount; however, Adjudicators are reluctant to grant any amount greater until the claim is ended and a possible pension review is being planned. The OEA suggests that the amount of SIEF granted has little connection to the express policy at the Board. Further, the OEA has advised its clients that the quantum of SIEF granted initially may be reduced or eliminated upon appeal. The discussion paper refers to the difficulty in explaining a downward adjustment in SIEF to the employer, since the employer believes that the original given should remain. Part of the enigma of downward SIEF adjustment flows from the lack of information provided to the employer by the Board. The "explanation" provided by the Board usually arrives by way of a form letter outlining general policy but not speaking to the individual claim. In many instances, employers are not notified of any downward adjustment and are left to discover the change on an accident cost statement.

The discussion paper further addresses the issues of "inconsistency" when it states that "SIEF may not be relevant for temporary benefit costs that can arise when an enhancement factor is identified a the permanent disability assessment". What concerns employers is not the proper adjustment in the level of SIEF but the lack of uniformity in the application of the policy. If the Board reviews SIEF at the claims level then it should, logically, review SIEF at the pension level. When SIEF is not considered at that level, it leaves the employer to have to request a review or commence an appeal in order to bring about a review.

d. Worker benefits

Although SIEF is primarily associated with employer costs, SIEF policy can also have an impact on worker entitlement and benefits. At initial entitlement, it might be suggested that SIEF affords an opportunity to err, if necessary, on the side of the worker without provoking an employer objection. At the time of permanent disability assessment, evaluation of the extent of pre-accident disability will sometimes affect the amount of a permanent disability award.

Other impacts of SIEF on worker benefits can include adding a multiple or enhancement factor to a permanent disability award. Both are identified through calculation, and then are totally removed from the employers costs, unless they result from the compensable accident. Since a multiple factor (bilateral disabilities only) is distinctly different from an enhancement factor, it is possible to have both in one claim.

However, a different rule of application is followed in the case of total blindness, where the pre-existing disability is blindness in one eye. Rather than add the enhancement factor to the new condition only, the pre-existing disability is also added.

Another situation highlighting an inconsistency in SIEF application arises when worker awards are reduced. If a worker does not receive the full clinical impairment award because of a moderate or major pre-accident disability, should the employer receive any cost relief on the amount that is awarded? While in current practice additional cost relief is provided to the employer for the actual permanent disability award, presumably the reduction of the worker award in view of the pre-accident disability has already accounted for this factor.

Consistent application sometimes requires investigation of a worker's personal and financial history. Such investigations are not always undertaken. For example, if the Board learns of a prior and measured disability that is similar to the one being rated, this can be deducted from any current clinical impairment.

SIEF policy also allows inconsistency in its treatment of Schedule 2 workers and employers. Although Schedule 2 employers are not eligible for SIEF cost relief, Schedule 2 workers may have pension awards reduced because of a pre-accident disability.

OEA RESPONSE

The suggestion that SIEF affords an opportunity to "error" by adjudicators at initial entitlement on behalf of the worker is sound. Employers have expressed concern that claims which result from pre-accident conditions could not be allowed. It appears that the practice of the Board is to allow the claim and then grant the quantum of SIEF to pacify the employer. The decision to be taken is one of denial rather than allowance.

The situation where a worker has a permanent disability award reduced due to a pre-existing condition is rare. It would appear fair and just to reduce the award where it is found that the pre-existing condition is contributed to the permanent disability. Why should the Workers' Compensation Board compensate for non-compensable conditions?

To illustrate this point further, one can examine the practice of private insurers. When an individual requests private coverage, he or she must disclose any physical or mental condition. In many instances, the insurer will exclude the list of conditions from coverage.

In the tort system, awards are reduced if it is demonstrated that the claimant suffered from a physical or mental condition for which monies are being requested. In long-term disability plans, insurers limit the amount of money payable to a specific term, while disclosure of prior medical records is not required, the insurer can deny coverage on the basis that the condition is not covered by other types of insurance or is of a nature that cannot be supported medically.

In a claims-driven insurance system, where an individual requests coverage for a particular condition, their doctor must list any other condition which affects the individual. The insurer may reduce the size of the award, deny benefits altogether or reduce the period of payment.

As WCB is an insurer guided by the basic principle of insurance, it is logical that it would possess a similar position in the governance of benefits system. At present, the Board does not require declaration from a worker as to other medical conditions at the time of hiring or when compensation benefits commence, nor at the time of pension rating.

Schedule 2 workers, by virtue of this insurance principle, are also subject to reduced awards because of the "pre-accident disability".

9. Pre-existing psychological conditions

The policy for "The Adjudication of Claims for Psychotraumatic Disability" is contained in Bd. M. 4951 #11, February 9, 1982. In part, it provides for the allowance of cases of a prior psychiatric condition on an aggravation basis having regard for the emotional effect of the occupational occurrence and its sequelae. The policy also identifies the application of SIEF for psychiatric awards.

Further elaboration on SIEF application in these cases is provided in "Claims Adjudication Branch Procedures Manual" Document # 33 28 03 page 4, as follows:

> With psychological conditions the possibility of prior psychic trauma from life could be considered as evidence of vulnerability and justify recommending relief to the employer, even in the absence of pre-existing psychological impairment.

This specific provision for psychological conditions has been seen as altering the usual determination of SIEF application and introducing a less precise standard for qualification. In practice, a majority of claims for psychiatric disabilities receive SIEF simply because of this statement. However, it is difficult to assess the extent of the pre-existing condition in the absence of any prior identifiable psychiatric condition or impairment.

OEA RESPONSE

What is remarkedly absent from this section is an explanation as to how the Board will deal with chronic pain in SIEF. One would assume that it should be handled in the same fashion as pre-existing psychological conditions?

The policy, the discussion paper suggests, alters the "usual determination of SIEF application" and claims that it is difficult to assess the extent of the pre-existing condition. This finding is puzzling since the same process applies to pre-existing conditions which is defined in this paper as "a symptomatic condition which only become manifest post-accident".

10. WCAT approach

In Decision 431/89, WCAT expresses the following view of SIEF:

> ...the policy is driven primarily by equity and employment considerations....Presumably, if an employer realizes that it will not be fixed with the costs of any recurrence reasonably attributable to the disability, then an employer will be more inclined to hire the disabled worker.

WCAT's use of the term "recurrence" in this context appears to be in error. When defined as a recurrence, claim costs are charged to the original accident employer, not to a new employer. This apparent misunderstanding relevant to recurrences is further illustrated in Decision 910/89. The worker's claim for a recurrence of disability was accepted by the Panel. In directing the Board to pay the worker lost time benefits, the Panel also directed that SIEF application be considered. It is unclear whether this is suggested because the Panel did not consider that recurrences are charged to the accident employer.

With respect to psychiatric conditions and SIEF, in Decision 431/89 the Panel stated:

> The Board has recognized the difficulties created by psychological conditions and appears to provide a lower threshold for entitlement to SIEF relief in cases involving non-organic conditions....Where the prolonged recovery is attributable to non-organic factors...the assumption of at least a minor pre-existing psychological condition is, prima facie, a reasonable one....

This comment suggests that it is this Panel's view that all claims prolonged by psychological factors inherently involve a pre-existing psychological condition and are thus eligible for SIEF.

OEA RESPONSE

From a review of WCAT decisions, the OEA found that the Tribunal did not deal extensively with SIEF cases to a degree where a trend or direction in policy could be found. The Tribunal decision referred to in this section, Decision 431/89, does however outline a clear direction of what SIEF is to accomplish.

The discussion paper, in its interpretation of Decision 431/89, is wrong in its conclusions. The WCAT panel does not misuse the term "recurrence" as is suggested by the discussion paper. Referring to Board policy on SIEF page 1 of document 33 28 01 of the Board's Adjudicative Manual, the panel correctly reflected the direction of that policy.

The panel did elaborate on its interpretation of the SIEF policy-related legislation. The panel found that:

> "Ideally, in any case involving a lengthy or unusual recovery, the Board will have a report of psychiatric examination which dealt, at length, into prior psychic trauma, the worker's life experience, family conditions, work conditions, financial conditions, personality traits, previous psychological disorders and treatments for anxiety, depression or mood changes."

Citing Workers' Compensation Board physician, Dr. Tyndel, as having the key to the solution, the WCAT panel quotes:

> "In a case where there is no objective documentation of predisposition, such as pre-accident emotional disorders, pre-disposition for the development of a psychiatric disorder is only an assumption and by no means a finding. This assumption is based on the observation that certain individuals do develop emotional disorders, while others do not, although the traumatic events have been identical or similar ... ."

The WCAT found that Dr. Tyndel's comments:

"Dovetail with the Board's SIEF policy recognizing the difficulty inherent in situations involving psychological conditions. Even in the absence of pre-existing psychological impairment, the Board recognizes that it may be appropriate to consider as evidence of vulnerability, the possibility of prior psychic trauma from life experience, in order to justify the recommendation of some SIEF relief to an employer." "Where the prolonged recovery is attributable to non-organic factors by the medical practitioners, the assumption is that at least a minor pre-existing psychological condition is prima facie a reasonable one and is consistent with the Board's explanatory note ... ."

"The panel's suggested approach in SIEF cases involving psychological conditions is also consistent with equity considerations which are essential to any compensation system. Interesting and striking a reasonable balance between the interest of workers and the interest of employers. The panel further recommended that the Board's administrative fund be used in some cases where it would be inequitable to charge some or all of the costs to the employer."

For reasons unknown, the discussion paper did not elaborate on the findings in Decisions 431/89. The paper extracted certain parts of the decision which misrepresented the findings of the WCAT.

Attached in Appendices D and E is OEA data on WCAT SIEF decisions.

III. DISCUSSION

1. The 1990's context

a. SIEF as an incentive to employ disabled workers

If the primary objective of SIEF is to provide an incentive to employers to hire disabled workers, the threshold question is whether its application has, in fact, achieved this goal. There is little direct evidence available to suggest whether this is the case. Indirect evidence (for example the views of Board staff who administer SIEF) suggests that it may achieve this goal in certain limited instances.

There are three scenarios where the employment of disabled workers arises.

SIEF DISCUSSION PAPER

OEA RESPONSE

It is surprising that the WCB, as an organization, does not keep statistics on the use of SIEF as an incentive to employers in the hiring injured workers. According to the 1988 WCB annual report, the Board assisted 6,498 workers in returning to some form of employment. Of those, how many workers benefited from utilization of the SIEF?

This type of information would be extremely useful in considering the future direction of the SIEF.

i. Employment of individuals with non-compensable pre-existing conditions

Since there are no statistics available regarding the impact of SIEF on employee selection in the general community, this is principally a matter of speculation. Individuals with visible disabilities which have a significant impact on employability may, in theory, benefit from the availability of the SIEF. However, it is more likely that the nature of the work, its relation to the disability and the individuals' qualifications are more critical to the hiring decision than the knowledge that, in some cases, a subsequent injury can be charged to SIEF. In addition, it is unknown how many human resource personnel are even aware of the Fund's existence.

To gain additional insight with regards to the employment of disabled individuals, information was obtained from a report entitled "Statistical Profile of Disabled Persons in Ontario", based on a Statistics Canada survey completed in 1983-84. Data from this report indicated that of the estimated 304,000 disabled Ontarians who were employed at the time of the survey, about 35,000 reported that they were provided with special equipment and/or special arrangements at work due to their condition. The survey also indicated that about 10,000 disabled Ontarians needed special arrangements or equipment that was not provided by their employers.

Aside from establishing whether SIEF enhances employment opportunities for disabled individuals, an important question is whether individuals with pre-existing non-compensable conditions should be a target of Board programs. While the Board supports employment for all disabled individuals, the Act is not designed to address the disabled in general. Indeed, a legal analysis of the Act suggests strongly that the Board has no authority to provide incentives for the hiring of disabled individuals who are not injured workers. Other statutes, such as the Human Rights Code, discussed later, do provide a measure of protection for these individuals.

OEA RESPONSE

The OEA supports the employment of disabled individuals but does not believe that the SIEF has application to all workers in the province. The OEA believes that SIEF should be available to workers who have legitimate work-related claims with the Ontario WCB.

ii. Employment of injured workers with the accident employer

Recent policy changes will encourage employers to re-employ their injured workers. For example, the change to the s.54 policy requires that all vocational rehabilitation costs be identified on the employer's Accident Cost Statement. It is anticipated that employers will now more fully appreciate the costs of work-related injuries and, in an effort to reduce the cost of vocational rehabilitation, will re-hire their own injured workers. Employers are also becoming aware that reducing accident costs may improve experience rating benefits and decrease susceptibility to a penalty under s.91(4) or (7) of the Act.

The implementation of the Vocational Rehabilitation Strategy will also encourage employers to provide suitable employment for their disabled workers through its capacity to assist employers in developing modified work programs. The optimum result of a vocational rehabilitation program is to return an injured worker to the accident employer. The emphasis of the Vocational Rehabilitation Strategy, now implemented province wide, is to return the worker to the pre-injury job if possible.

Section 54b of the Act as amended by Bill 162 also addresses the re-employment of injured workers in the workplace. This section obliges employers to provide their workers with re-employment whether at the pre-injury job or at comparable employment. If a worker is unable to perform the essential duties of the pre-accident job, the employer will be obliged to offer that worker the first opportunity to accept suitable alternative employment. This obligation extends for 12 months from the date that the injured worker was able to return to work. Employers who fail to meet this obligation to re-employ could be assessed a penalty. This reinstatement provision is a fairly strong incentive for employers to re-integrate injured workers into their workplaces.

OEA RESPONSE

While the OEA supports the amendment of WCB policy & procedure to reflect the original intent of the SIEF to allow for financial relief where pre-accident medical conditions are found and/or where an injured worker has returned to employment with the accident employer or a new employer.

While the discussion paper theorizes that employers will be encouraged to "re-employ" their injured workers as a result of changes to the Act and policy, such as Section 54, Section 91(4), Section 91(6), Section 91(7) and Section 54(b) of the Workers' Compensation Amendment Act, 1989 (Bill 162), the OEA believes that SIEF is an essential component to the workers' compensation system and must remain in order to maintain equity between both employers and workers.

The discussion paper reflects an unavailability of data, correlating SIEF awards with return to work and the impact of employer penalties under Section 91(4)(7) and Section 54(a) which includes the cost of rehabilitation to the employer.

Further, the correlation between Section 54(b) (Bill 162) and return to work is highly speculative considering that this section and accompanying penalties have not yet been applied in individual cases.

iii. Employment of injured workers with a new employer

According to the current guidelines, the full or 100% cost of a claim is charged to SIEF where a worker suffers an accident during an on-the-job training program sponsored under the Board's vocational rehabilitation program.

The experience of vocational rehabilitation caseworkers suggests that, in many cases, employers are cautious about hiring individuals with known compensable disabilities. Arising from that premise, the availability of SIEF would likely meet its stated purpose by encouraging employment of injured workers. Furthermore, the provision of cost relief might provide an incentive to "take a chance" and hire workers with known medical problems.

A survey of 114 employers who had recently hired injured workers following an employment campaign was conducted in November, 1989. These employers were asked to rank, in order of importance, nine factors that may have influenced the decision to hire injured workers. The most significant factor identified in the survey was that "Financial assistance, for injured workers wages, is provided by the WCB's vocational rehabilitation programs". The factor stated as "The Second Injury and Enhancement Fund (SIEF) provides financial relief" was not perceived as a highly significant one. Only three employers placed this as first or second in importance to their employee selection decision.

Experience rated employers identified additional factors that influenced their employment decisions. In noting employers' responsibility to hire injured workers and the fact that recurrences are charged to the original accident employer, experience rated employers suggested these factors were as significant as the financial assistance provided by the Board. Larger employers (250+ employees) demonstrated similar views to those of experience rated employers.

A review of workers placed in jobs with new employers as a result of employment campaigns dating from March to October 1989 revealed that of 218 workers, only 4 workers (1.8%) had new accidents and only 8 workers (3.7%) suffered recurrences of the work-related disability. Of the new accidents recorded, only one involved lost time. This reveals that the number of new accidents for injured workers placed in industry under the Board's vocational rehabilitation initiatives is very small.

OEA RESPONSE

The Board indicates that 114 employers surveyed stated that the SIEF is not "highly significant in the hiring of individual workers; yet they produced statistics with respect to the involvement with SIEF in the VRD programs. Moreover, employers did clearly identify that "financial assistance for injured workers' wages is a significant factor". The paper goes on to state more than 5% of workers hired between March and October suffered a new injury or recurrence within the six-month period following date of hire. The employer survey with accompanying statistics does not illustrate if SIEF was used in any of those claims or if SIEF was used to deal with the more than 5% of workers reinjured.

b. Vocational rehabilitation programs

Keeping pace with developments in vocational rehabilitation and ergonomics, the Board has vocational programs designed to assist a worker's reintegration into the workforce after an injury and to provide financial benefits to employers to help with the costs of reintegration. Through work trials, training on the job, job modification and workplace modification, the Board encourages the development or maintenance of an employment relationship between a worker and an employer.

The work trial is usually a short assessment program during which the Board pays full compensation benefits to the worker. This program is a trial placement of a worker with an employer to ascertain worker-job compatibility at no cost to the employer.

Often preceded by a work trial, the training on the job program is intended to teach an injured worker new vocational skills and to provide "hands on" instruction and supervision in the performance of skilled work methods. The Board may share up to 50 percent of the cost of such a program with the employer.

To ensure that an injured worker is able to complete job duties, modifications both to the job and to the workplace may be required. A professional work site analyst provides consultative services and recommendations regarding job and/or workplace modifications to an employer free of charge. Job modifications are designed so that the requirements of the job and a worker's physical restrictions are compatible. Workplace modifications involve the physical alteration of a workplace, the provision of specialized equipment and/or modification of existing equipment.

OEA RESPONSE

Vocational rehabilitation programs are a vital part of the WCB system. The discussion paper suggests that vocational rehabilitation services are available to complete the task of returning workers to the work-place.

Employers often complain about the availability of vocational rehabilitation services and the long delays involved in obtaining vocational rehabilitation assistance. The "professional worksite analyst" can review a workplace, but it may take him/her as long as eight weeks before he/she can attend the employer's premises.

George MacDonnell, former President of the Council of Ontario Construction Associations, appearing before the Standing Committee on Resources Development (SCRD) on June 13, 1988, stated:

> "... we are not getting efficient, effective, quick rehabilitation of injured workers and that is a serious drawback".

Herb MacDonald, WCB Adviser for the International Association of Bridge, Structural and Ornamental Iron Workers, told the SCRD Committee, on June 9, 1988, that:

> "It is my experience with the rehabilitation system that I have not gotten one person, not one, in all the people that I have dealt with over the past four years, who has received a job which went through the system of rehabilitation at the Workers' Compensation Board."

Both stakeholder organizations may agree that what is discussed in this paper is the theory, but is certainly not the reality of the Vocational Rehabilitation Division.

With the implementation of the 45-day contact period under Bill 162, the merits of a Vocational Rehabilitation Division may increase since contact with injured workers will now be mandatory.

c. Ontario Human Rights Code

When SIEF was established, there was no statute in place to safeguard the employment rights of the disabled. It was not until the adoption of the Ontario Human Rights Code in 1981 that employment protection was provided for disabled individuals. The Code, by recognizing handicap, whether physical or mental, as a prohibited ground of discrimination in employment, created new protection for disabled workers. In addition to the general provision, the 1984 amendment to the Human Rights Code included specific protection for injured workers in s.9(1)(b)(v).

SIEF DISCUSSION PAPER

OEA RESPONSE

To argue that SIEF was the safeguard for the protection of the rights of the disabled is incredulous. This paper seems to suggest, since we now have the Ontario Human Rights Code, we can do away with the SIEF. The SIEF is not parallel in purpose to the code. It does not, by way of policy, protect rights nor does it claim to adjudicate disputes over those rights.

d. Experience Rating and SIEF

The WCB administers three experience rating plans: NEER, CAD-7, and the Voluntary Plan. These three plans now include about 61,300 (or 30%) of Ontario's 200,000 employers. It is expected that the number of experience rated employers will increase yearly as additional rate groups are included in NEER.

Each plan, through its own formula, rewards employers who reduce their accident costs through rebates, and penalizes employers with excessive accident costs through surcharges. The clear intent of the programs is to focus assessment costs on employers with the worst accident experience -- not to spread this risk amongst other employers. Therefore, experience rating and SIEF may not always be compatible.

For example, some employers may try to reduce their costs by seeking SIEF relief for any perceived pre-existing condition, rather than concentrating on improving workplace safety to reduce the number and severity of accidents. This practice undermines the "risk focusing" intent of experience rating programs.

Similar concerns were expressed in a 1985 brief to the Standing Committee on Resources Development prepared by the Association of Injured Workers' Groups. In this brief, it is stated that:

> The implication of a cost transfer is that all employers, safe and unsafe, pay additional assessments resulting from the transfer....The Board is taking a very short-sighted view by allowing SIEF transfers to skyrocket. Instead of passing on costs to all employers, the Board should be dealing directly with the high accident and disease rates of the unsafe employers.

OEA RESPONSE

SIEF and Experience Rating, administered properly, are compatible. While it is possible that some employers may try to reduce costs through SIEF, the program must remain to benefit all employers. The Board would not suggest eliminating the "benefit of doubt" principle, because some workers may use it in order to gain compensation benefits improperly.

The discussion paper also focuses on the Standing Committee on Resources Development (SCRD) in 1985, and notes the concerns of the Association of Injured Workers on SIEF. The SCRD 1985 report is valuable, in that it addresses Experience Rating and recommends the following changes to Board policy:

> "The Board should put more emphasis on working with employers to help finance ways in which workplaces can be modified, so as to accommodate injured workers."
>
> "The Committee believes that the assessment rate of employers who hire and rehire injured workers should be lower than the rate of those employers who do not. Such a policy would serve as an incentive to employers to involve themselves in the rehabilitation of injured workers."

The SCRD 1985 makes no mention of the concerns expressed by the Association of Injured Workers. It is odd that the discussion would have to reach back over five years to find an obscure comment on SIEF from injured workers.

e. Revenue Strategy

As a result of the Revenue Strategy deliberations, there may be other changes to the 1990's context of workers' compensation in Ontario. The Revenue Strategy is considering a concept known as the "per claim limit". This concept sets a dollar limit on the costs of a claim for which the employer and the relevant classification group (employers operating similar businesses with comparable risk) would be responsible. The costs exceeding the per claim limit would be shared and funded by the classification group belonging to the larger industry sector (employers operating within the same general industry). This is being considered as a way to improve classification group stability by spreading the costs above the per claim limit to a broader group of employers who are part of that industry sector. In contrast to SIEF, this consideration is a fundamentally different approach to the reallocation of employer costs.

SIEF DISCUSSION PAPER

OEA RESPONSE

The OEA has submitted its commentary and recommendations on the Board's revenue strategy. One key recommendation surrounds SIEF and its expressed inclusion in the revenue strategy. Why the Board would review revenue matters apart from SIEF is not comprehensible. Each component has implications for the other.

2. Financing of SIEF

Section 108(2) explains the financing of this special fund as follows:

> ...may add to the assessment for any class or classes in Schedule 1 a percentage or sum for the purpose of raising a special fund to be laid aside....

This wording seems to contemplate a special fund to be laid aside and used for a specific purpose, the loss arising from any disaster or other circumstance that would unfairly burden the employers in any class. Originally there was a fund set aside from which money was withdrawn. However, in current practice there is no longer a separate fund set aside for the purpose of withdrawing funds to cover SIEF transfers. In order to cover the amount in this account, an actuarial calculation is made and this amount is added to the assessment for each rate group thus spreading the cost of SIEF across all Schedule 1 classes and employers.

Increasing disenchantment with SIEF from the employer perspective was noted by John Bulloch, President, Canadian Federation of Independent Business (CFIB). In a keynote address in December 1987 to the Employers' Council on Workers' Compensation, Mr. Bulloch, referring to a study commissioned by the CFIB that recommended: "development of specific limits on the degree of utilization of the Second Injury Enhancement Fund." He further stated:

> For the individual employer relief is vital and welcome, but overall, the costs of this "slush fund" are reallocated to every employer in WCB.

By not maintaining a separate and discrete fund as proposed in the statute, there is far greater opportunity for misuse of SIEF. In practice, the number and value of transfers controls the amount of SIEF annually, rather than the amount available in a reserve fund controlling the use of SIEF.

OEA RESPONSE

The "disenchantment with SIEF" by some members of the employer community is noted in the discussion paper; however, context has been ignored.

The CFIB study entitled "WORKERS' COMPENSATION IN ONTARIO" - a study of the costs, impacts and strategies for responsible control, was addressed by CFIB President, John Bulloch. The proper context of the comment and the findings expressed in the CFIB study are reflected in the conclusions (p. 38) of the CFIB report:

" Fiscal responsibility is being eroded by excessive use of the Second Injury Enhancement Fund.

" Both of these accounts, supplementary (awards) and Second Injury, are symptomatic of a problem in the proper adjudication and funding of valid claims. A new approach is required."

The attention on SIEF refers to the result in "erosion" due to ineffectual adjudication and funding. "Misuse" of the fund results from Board error and not the suggested alternative proposed on the discussion paper.

3. Section 122(8)

SIEF policy includes specific provision for cost relief for a percentage of hearing loss and vibration induced white finger disease claims. This provision is based on the premise that exposure to hazardous noise in prior employment will have caused some pre-existing hearing loss and that exposure to vibratory tools in prior employment will have contributed to the development of vibration induced white finger disease. The cost transfer is based on a ratio, by years, to the worker's total exposure employment.

The issue has been raised whether SIEF should be used at all in the cost allocation of occupational diseases. It has been suggested that the better alternative to providing SIEF for occupational disease claims is to use s.122(8) which specifically addresses the cost allocation of occupational diseases:

> Where the compensation is payable out of the accident fund, the Board shall make such investigation as it considers necessary to ascertain the class or classes against which the compensation should be charged and shall charge or apportion the compensation accordingly.

SIEF DISCUSSION PAPER

OEA RESPONSE

The use of this section in addition to SIEF may assist in properly allocating costs to the " responsible " party. In order to achieve this goal the WCB would also, in fairness to all employers, pursue third party actions against those responsible employers not covered in the WCB system at present.

IV. CONSULTATION

This discussion paper has highlighted issues and complexities related to the application of SIEF. The WCB Board of Directors expects that this discussion will be of interest to all Board stakeholders. Accordingly, the Board of Directors has requested that all interested parties submit their concerns respecting this policy issue. A four month period has been established for consultation.

SIEF DISCUSSION PAPER

OEA RESPONSE

The period of four months in which employers must respond to the contents of this discussion paper is unrealistic. The OEA, as it has proposed in the past, recommends a minimum period of six months to allow all interested parties the opportunities to consult, research, and respond.

The OEA compliments the Board on doing a discussion paper on SIEF and putting the document into the stakeholders domain for consultation.

DRAFT

CLAIMS ADJUDICATION BRANCH
PROCEDURES MANUAL

REFERENCES: Section 104 (1) (2)
Section 108 (2)

Policy: The presence of any condition pre-existing or following entitlement granted for the results of an impairment deemed compensable may have an influence on the extent of entitlement granted to a worker or may influence the employability of that injured worker.

TEMPORARY DISABILITY:

1. All levels of adjudication must review the non-impairment medical information prior to a review of the accident information provided
to determine whether a claim is compensable and the extent of possible SIEF to be granted an employer . A claim for a work injury involving a pre-existing condition may be allowed for the acute episode only and entitlement to payment of compensation once the worker has attained the measured pre-accident state.

2. If the period of disability as a result of the accident becomes prolonged due to the pre-existing condition, all or a portion of the costs may be transferred from the accident employer in Schedule 1 to the SIEF.

3. When non-occupational, unrelated health problems prevent an worker from undergoing treatment for the compensable disability benefits should be suspended, reduced, or full SIEF relief granted to the employer.

4. Unrelated, non-occupational health problems may exist prior to the compensable injury or become evident following the injury. For instance:

a. Degenerative Disc Disease
b. Epilepsy
c. Diabetes
d. Cardiac Disease
e. Arthritis
f. Amputation
g. Loss of sight
h. Polio
i. Cerebral palsy
j. Multiple sclerosis
k. Parkinson's disease
l. Chronic Fatigue Syndrome

m. Cerebral vascular
n. Tuberculosis
o. Psychoneurotic/Psychiatric Condition
p. Haemophilia
q. Chronic osteomyelitis
r. Ankylosis of joints
s. Hyperinsulism
t. Muscular dystrophies
u. Ruptured intervertebral disk
v. Arteriosclerosis
w. Cancer
x. Thrombophlebitis
y. Compressed air sequelae
z. Ionizing radiation injury

and other conditions which may be added from time to time.

5. If the pre-existing condition or unrelated health problems impede the treatment of the compensable disability, a limited period of treatment (2 weeks) may be considered provided that this treatment will reduce the cost of the eventual Permanent Disability Award by 50%. During this period, temporary partial benefits will continue.

6. Where it is medically established that the sole cause of the continuing disability is the pre-accident or unrelated health problem, benefits should cease.

7. Claims may be allowed for a once only repair recognizing that a compensable accident did occur but that the resulting treatment and period of disability were due in part to that the pre-existing condition. Full relief will be granted the employer.

8. Permanent disability awards enhanced by a pre-existing condition shall be reduced by the measurable condition or full SIEF shall be granted to the employer.

9. Physical, psychological, chronic pain, stress, and all other mental disorders are included.

II. Measurable Prior Conditions:

1. Where the prior condition is measurable it shall be taken as a value of the pre-existing condition less the sum of the value of the entire disability which will equal the enhancement factor.

III. Non-Measurable Prior Conditions:

1. Where a pre-existing condition enhances the residual disability but is not measurable the following will apply:
   a. Condition producing moderate pre-accident disability--award 90% assessment.

b. Condition producing moderate pre-accident disability--award 70% of total assessment.

c. Condition producing major pre-accident disability--award 30% of total assessment.

NOTE:If the prior condition was compensable, the costs attributable for the claim would be borne by the responsible employer.

d. Alcoholism should be considered a non-measurable condition.

IV. APPLICATION:

1. Once you have determined the measurable amount, and SIEF is in order, that amount is to be deducted from the total costs to date.

2. At every review of the claim, you are to examine the file for SIEF application and make adjustment upward only. The worker should be confirming by medical report both the compensable and non-compensable conditions.

3. All levels of adjudication are bound by the SIEF quantum awarded the employer.

4. Under separate cover, you are to inform the employer as to the SIEF calculation and set out all reasons and mathematical calculations.

5. If the worker should refuse to continue providing the non-compensable medical information benefits should be suspended.

6. Ensure that the Revenue Branch/Experience Rating Section is in receipt of all SIEF awards as soon as the employer is notified.

7. Refer to the scale of relief, attached, for guidance on the quantum of SIEF.

8. If you receive a letter of objection from the employer, review and note all relevant information in a memo to the SIEF specialist setting out reasons for actions taken.

CANADIAN JURISDICTIONS

STATUTORY AUTHORITY FOR SIEF

WCB Discussion Paper On SIEF

NEWFOUNDLAND

Section 104(1) of the Newfoundland Workers' Compensation Act:

The Commission may, in addition to the amount actually required in each class for the year, assess, levy and collect from the employers in any class surcharges to be set aside as reserves

(b) by way of providing a reserve fund to be used to meet such part of the cost of claims of workers suffering enhanced disabilities, because of similar or other disabilities previously suffered, as in the opinion of the Commission is the result of the previous disabilities;

NOTE: (8) The second injury reserve is used to relieve the employer's experience, of the costs of an injury, that is the direct result of a previous injury or a pre-existing condition. (Operations Manual)

NOVA SCOTIA

Section 89(2) of the Nova Scotia Workers' Compensation Act:

The Board may, in respect of the employers in any industry or class or classes, assess, levy and collect in each or any year such amount as the Board may deem just and proper to be set aside as a reserve or reserves:

(e) by way of providing and maintaining a second injury fund from time to time as the Board may deem advisable in the course of the administration of the Act.

NEW BRUNSWICK

Section 57(2) of the New Brunswick Workers' Compensation Act:

A system of merit rating may, if deemed proper, be adopted by the Board.

NOTE: The New Brunswick Board's actuary indicated that an SIEF system is accounted for in experience rating calculations, pursuant to s. 57(2). There is however provision for a 'disaster fund' under Section 65.

PRINCE EDWARD ISLAND

Although there is no provision in the statute for SIEF nor is there an SIEF policy, there is a disaster fund arising from section 57(2) of the Prince Edward Island Worker's Compensation Act.

WCB
Discussion
Paper
On SIEF

QUEBEC

Section 99(3) of the Quebec Workers' Compensation Act :

Where an employer employs a worker handicapped as a result of a previous accident, a congenital infirmity or a pathological condition, the Commission may charge all or part of the cost of expenditures and benefits respecting such accident to a special fund.

Section 99(4) states:

The Commission may add to the assessment for any or several units or all classes of units a percentage or additional sum in order to establish the special fund contemplated in subsection 3.

MANITOBA

Section 81(1) of the Manitoba Workers' Compensation Act:

For the purpose of creating and maintaining an adequate accident fund, the board shall every year assess and levy upon and collect from, the employers in each class by an assessment or by assessments made from time to time rated upon the payroll, or in such other manner as the board may deem proper, sufficient funds, according to an estimate to be made by the board,

(e) to provide a fund to be used to meet that part of the cost of claims of workmen suffering enhanced disabilities, because of similar or other disabilities previously suffered, as, in the opinion of the Board, is due to the previous disabilities;

SASKATCHEWAN

Section 144 of the Saskatchewan Workers' Compensation Act:

The board may, where it considers it proper, add to the assessment for any class or for all the classes a percentage or sum for the purpose of raising a special fund to be set aside to meet the loss arising from any disaster or other circumstances the liability for which would, in the opinion of the board, unfairly burden the employers in any class.

ALBERTA

Section 16(1) of the Alberta Regulations under the Alberta Workers' Compensation Act:

The purposes for which the Board may assess and levy on employers under section 91 of the Act are the following :

(c) to provide and maintain any reserves the Board deems advisable in the course of its administration of the Act.

WCB
Discussion
Paper
On SIEF

BRITISH COLUMBIA

Section 39(1) of the British Columbia Workers' Compensation Act:

For the purpose of creating and maintaining an adequate accident fund, the board shall every year assess and levy on and collect from independent operators and employers in each class, by assessment rated on payroll, or by assessment rated on a unit of production, or in a manner the board considers proper, sufficient funds, according to an estimate to be made by the board, but the established practice of assessment and levy shall be varied only with the approval of the Lieutenant Governor in Council, to

(e) provide and maintain a reserve for payment of that portion of the disability enhanced by reason of a pre-existing disease, condition, or disability.

NORTH WEST TERRITORIES

Although there is no specific legislative authority to establish a SIEF, the North West Territories W.C.B. Claims Manual does provide a SIEF policy which is quite similar to the Ontario SIEF policy.

YUKON

Section 68 of the Yukon Workers' Compensation Act :

The board shall from time-to-time assess and levy upon the employers in each of the classes and subclasses such percentage of the payroll or such other rate, or such specific sum as, allowing for any surplus or deficit in the class, the board may require

(g) to provide and maintain a reserve for the payment of such part of the cost of claims of workers suffering enhanced disabilities because of similar or other disabilities previously suffered as is due to such previous disabilities.

WCB
Discussion
Paper
On SIEF

APPENDIX B

HISTORY OF SIEF IN ONTARIO

In 1915, s.88(2) [now s.108(2)] was added to the Act to provide authority to establish a special fund named the Disaster Reserve Fund. Notes to the amendment state that this section made provision to distribute a loss, resulting from a disaster, that would unfairly burden a class over all the classes.

Its purpose was further elaborated in the 1916 Board Report which stated that the disaster reserve was a small fund provided by s.88(2) of the Act intended to assist in payment of any unusual or unexpected loss arising from a disaster or other circumstance which might unfairly burden the employers in any class. The amount set aside for the fund was one percent of assessments. The Disaster Reserve Fund was first used in 1917 following a disaster in the milling industry on December 11, 1916 that resulted in twenty-two fatalities.

In 1925, costs were first transferred to the Fund for the purpose of second injury relief. The 1926 Annual Report explained this use of the Fund as a reflection of the Board's concern respecting injured workers who may encounter discrimination in the labour market because of previous loss of an eye or a limb. Referring to this subject as one of "grave difficulty", the Report states:

> The Board...have been trying out during the year the policy of charging against the class and the individual employer in such case only the percentage of disability which would be awarded for the injury actually done in such employment to an unmaimed man, and charging against this Disaster Fund the remaining cost of such total disability case.

The annual reports for these early years of the Board's history specify the amount transferred from the Disaster Fund for this purpose. The 1931 Report indicated that money was transferred from the Disaster Reserve Fund to the Pension Fund to remove the objection of employers to re-employment of injured workmen by putting them in the same position they would have been had the workmen been uninjured and charging against the Disaster Reserve Fund the additional costs of carrying such hazard.

Part of the impetus to use the Disaster Reserve Fund to safeguard the employability of disabled workers may have been related to the relative unavailability of vocational rehabilitation services. Employers had to pay for all associated costs when they employed disabled workers. To assist employers who hired injured workers the Board provided financial relief in the event of further related injury. Through this relief, the Board sought to mitigate the lack of incentive to employ individuals, such as war victims, who had permanent disabilities and were thought to be more apt to sustain further injury.

A Board order dated October 30, 1942 provided for the transfer of the capitalized value of a multiple factor to the Disaster Reserve. This did not apply if the amount was less than $500. A December 27, 1945 Board order established the Second Injury Fund as separate from the Disaster Reserve Fund. It was to be considered only in those cases where an award for permanent disability was increased by reason of a previous permanent disability. In 1946 the name of the fund was changed to the Second Injury Reserve, and pre-existing impairment of vision was added as a cause to transfer costs to the fund.

Second injury relief became increasingly accessible over time due to the expansion of the circumstances in which it could be applied, the range of percentage amounts that was transferable, and the nature of the conditions that were considered to be pre-existing. A Board order dated June 3, 1953 expanded the fund to include "where {a worker} is suffering from a visible defect and loss of function of a limb or limbs from any cause...".

In October 1955 the Board appointed a committee to consider and make a recommendation as to the possible increase in scope of the Second Injury Fund. A Board order dated December 7, 1955 expanded the Second Injury Fund to include:

- amputations of limbs or parts thereof....,
- other structural defects of limbs or parts thereof from any cause,
- impaired hearing of one ear where the other ear was previously impaired,
- diseases or conditions which impair the circulation of an injured part sufficient to increase the permanent disability (eg. diabetes) and,
- latent conditions brought to light by superimposed injury, resulting in disability out of proportion to the injury itself.

In 1965, a recommendation was made to the Board to change the name of the fund to the Enhancement Reserve, denoting a reserve to cover increased costs not directly related to the employer. Although this did not occur, a Board order dated June 28, 1967 expanded the fund further to include full cost relief of permanent disability awards where the pre-existing condition would not itself be disabling (eg. diabetes) and; reduction of a permanent disability award over 15% depending on the extent of SIEF relief where the prior condition was not measurable and of a disabling character. The name was changed to the Second Injury and Enhancement Fund.

A Royal Commission in 1967, under the Honourable Mr. Justice G.A. McGillivray, considered labour and employer submissions respecting pre-existing conditions and the Second Injury Fund. This resulted in a recommendation that, where compensation may involve activation or aggravation of a pre-existing condition, a portion of the compensation awarded be paid from the Second Injury Fund. This proposal also reflected concerns raised by such groups as the Epileptic Association of Canada.

Arising from the Royal Commission recommendations, Board orders of March 25, and May 8, 1970, initiated major changes to SIEF.
These included:

- 50% cost relief on costs for temporary disability and medical aid, as well as for claims involving neurosis and psychoneurosis,
- 100% cost relief where: i) the prior condition was the cause of the accident (eg. epilepsy); ii) the wearing of an artificial appliance was the cause of the accident; iii) a disabled worker having been placed by the Board's Vocational Rehabilitation Department suffered a recurrence of the original disability or extension of disability through minor accident; iv) a worker suffered an accident during an on-the-job training program or other type of formal training procedure sponsored by the Vocational Rehabilitation Department;
- cost relief in hearing loss cases for the portion of hearing impairment not related to the employment if a pre-employment audiometric exam was available or; if no audiometric exam was available the employer would be charged in ratio by years to the workers total exposure employment with the balance transferred to SIEF.

A policy change approved November 3, 1978 provided a more detailed means of determining employer cost relief by assessing the severity of the accident in relation to the severity of the pre-existing condition (Appendix C). This change, which could be viewed as a fairer approach to evaluating the impact of prior conditions on costs, also permitted reduction in a worker's permanent disability award based on the extent of pre-accident disability. In a Board order dated April 8, 1980, no lost time claims became eligible for SIEF relief.

WCB Discussion Paper On SIEF

T A B L E

APPLICATION TO EMPLOYER COSTS

SEVERITY OF PRE-EXISTING CONDITION	SEVERITY OF ACCIDENT	% RELIEF
Minor	Minor	50%
Minor	Moderate	25%
Minor	Major	0
Moderate	Minor	75%
Moderate	Moderate	50%
Moderate	Major	25%
Major	Minor	90 - 100%
Major	Moderate	75%
Major	Major	50%

T A B L E

APPLICATION TO EMPLOYEE AWARD

WHERE A PRIOR CONDITION

IS NOT MEASURABLE

SEVERITY OF PRE-ACCIDENT DISABILITY	AWARD OF TOTAL ASSESSMENT
Minor	100%
Moderate	75%
Major	50%

Appendix D

WCAT - SIEF CASES

Year	Access		Leave		S21		Entitlement	
	#	%	#	%	#	%	#	%
1986	5	33.3	1	6.7	0	-	9	60.0
1987	103	92.8	1	0.9	2	1.8	5	4.5
1988	34	75.6	0	-	6	13.3	5	11.1
1989 (Jan-June)	1	33.3	1	33.3	1	33.3	0	-
Total	143	81.7	3	2.3	9	5.1	10	10.9

Number of Cases

WCAT - SIEF CASES

Employer Success Rates (Total or in Part)

Year	Access		Leave		S21		Entitlement	
	#	%	#	%	#	%	#	%
1986	5	100.0	0	0.0	0	-	4	44.4
1987	97	94.2	0	0.0	2	100.0	3	60.0
1988	30	88.2	0	-	2	33.3	0	0.0
1989 (Jan-June)	1	100.0	1	100.0	0	0.0	0	-
Total	133	93.0	1	33.3	4	44.4	7	36.8

**Number of Cases**

% Per Cent of Employer Success

Note: Reported Cases are wins only from totals available in Appendix D

Workmens Compensation Board

Claims Adjudication Branch
Procedures Manual

Document no.			Page no.
33	28	01	1

Section	Subject
SECOND INJURY AND ENHANCEMENT FUND	BASIC CONCEPTS

REFERENCES:

Section 108(2) of the Act.
Board Policies And Divisional Administrative Guidelines, Claims Services Division - Pages 235 to 238 and 242 to 245.

POLICY:

If a prior disability caused or contributed to the compensable accident or if the period of disability resulting from an accident becomes prolonged or enhanced due to a pre-existing condition, all or part of the compensation and medical aid costs may be transferred from the accident employer in Schedule I, to the Second Injury and Enhancement Fund (S.I.E.F.).

There is no provision in the Act for such a Fund to apply to Schedule II employers.

Both physical and psychological disabilities are included.

GENERAL INFORMATION:

1. The objectives of the policy are to give employers financial relief where the pre-existing condition enhances or prolongs the compensable disability, so as to encourage the employer to employ disabled workers. The decision to grant relief of costs to an employer is not influenced in any way by limitations placed on the worker's permanent disability award.

2. The S.I.E.F. policy approved by the Board, November 3, 1978, applies to claims processed on and after February 1, 1979; however, in claims processed for permanent disability awards and S.I.E.F. application prior to February 1, 1979, and where such claims are re-opened or reviewed subsequent to February 1, 1979, they are to be dealt with on the basis of the policy in effect prior to February 1, 1979 (that is, the Board Order of March 25, 1970) with the new policy approved November 3, 1978 being applied if it is to the advantage of the injured worker and/or the employer. Further additions and revisions were made to the policy and approved by the Board, April 8, 1980.

MINOR CHANGE September 6, 1984	October 13, 1983

GENERAL INFORMATION: (cont.)

3. In lost time and permanent disability claims where there has been aggravation of a pre-existing condition, the decision to apply the Second Injury and Enhancement Fund is to be made at the time of adjudication.

   In all other claims, the decision is to be made at the time of adjudication or as soon as it is recognized that an aggravation factor is contributing to the costs of the claim.

4. In fatal and no lost time claims the decision to apply relief under the Second Injury and Enhancement Fund is to be made at the time of adjudication.

5. The employer will be advised at the time of the decision. The actual cost transfer will be processed and details included in the employer's next monthly cost statement. Any subsequent cost transfers will be processed as the payments occur and appear on the employer's cost statement for the month in which the payments were made.

6. There shall be no minimum dollar value for transfer of costs to the Second Injury and Enhancement Fund.

TABLE

APPLICATION TO EMPLOYER COSTS

SEVERITY OF PRE-EXISTING CONDITION	SEVERITY OF ACCIDENT	% OF RELIEF TO EMPLOYER
Minor	Minor	50%
Minor	Moderate	25%
Minor	Major	Ø%
Moderate	Minor	75%
Moderate	Moderate	50%
Moderate	Major	25%
Major	Minor	90%-100%
Major	Moderate	75%
Major	Major	50%

February 1, 1979.

REFERENCES:

Section 108(2) of the Act.
Board Policies And Divisional Administrative Guidelines, Claims Services Division - Pages 236 to 241.
Basic Concepts, Document Number 33-28-01.

GENERAL INFORMATION:

1. In claims in which there has been aggravation of a pre-existing condition and ones where there is evidence that the disability following the accident has been enhanced because of the pre-existing condition the following will apply:

   a. Fifty percent (50%) of the cost of a claim (compensation and medical aid) shall be charged to S.I.E.F. where there has been an aggravation of a pre-existing condition and where there is evidence that the disability following the accident has been enhanced because of the pre-existing condition.

   b. If an employer appeals for relief in excess of 50% as provided in the previous paragraph, and a permanent disability is not evident, the degree of financial relief shall be reviewed again when the claim is closed. Appropriate relief shall be granted, if warranted, in keeping with the S.I.E.F. Application to Employer Costs, Exhibit #1, Document Number 33-28-03.

2. The full cost of a claim (compensation and medical aid) is charged to the S.I.E.F. in the following types of no lost time and lost time claims:

   a. where the prior condition is the cause of the accident, for example, epilepsy.

   b. where the wearing of an artificial appliance (either compensable or non-compensable) is the cause of the accident.

   c. where a disabled person has been placed in industry through the Board's Vocational Rehabilitation Division and suffers an extension of the original disability through minor accident.

GENERAL INFORMATION: (cont.)

d. where a worker suffers an accident during an on-the-job training programme sponsored by the Vocational Rehabilitation Division.

e. where a worker suffers an accident in a trade school or other type of formal training facility sponsored by the Vocational Rehabilitation Division.

Note: "Other type of formal training facility" may also include a Schedule II employer. Provided no wages are paid and no employer/employee relationship exists between the Schedule II training facility and the injured worker, injuries sustained by a worker participating in such a programme are charged to the accident employer with 100% S.I.E.F. relief.

f. Where a disabled worker is participating in a training/assessment programme approved by the Vocational Rehabilitation Division and the worker's compensable disability is the sole cause of an accident to another worker of the training/assessing employer.

3. In situations where alcoholism plays a role in the causation of an accident, it is not considered to be a pre-existing condition insofar as the application of S.I.E.F. is concerned.

PROCEDURE:

1. In reviewing medical and other information present in a claim file, the Claims Adjudicator should consider if the information suggests that a pre-existing condition is present, and if it has:

a. caused or contributed to the compensable accident,

OR

b. prolonged or enhanced the compensable disability.

2. If, in the opinion of the Adjudicator, it is likely that such circumstances exist, the Adjudicator must send a memo to the Team Co-ordinator and Section Medical Adviser outlining full details, and making recommendations regarding the application of the Second Injury and Enhancement Fund and, if it is to be applied, at what rate.

3. The Team Co-ordinator and Section Medical Adviser review the file and place their opinions on file, in response to the Adjudicator's recommendation.

PROCEDURE: (cont.)

4. When the claim is returned and if it has been agreed that the Second Injury and Enhancement Fund should be applied, the Adjudicator:

   a. Where the percentage of transfer is less than 100%, completes a Second Injury and Enhancement Fund Transfer, Form 711, files the carbon copy of Form 711 behind the Payment Authorization Sheet, Form 712, and delivers the original copy of the Form 711 to the Section Stenographer,

   OR

   b. Where 100% of the costs are to be transferred to the Second Injury and Enhancement Fund, updates the firm number on ENCOPS system to 077777 with a crum. (See: SYSTEMS: Crum, Document Number 33-29-03).

   and

   c. In the Warning Section of the claim file jacket, flags the nature of the underlying condition, the precentage of S.I.E.F. transfer and refers to the memo number that outlines details of the S.I.E.F. application.

   and

   d. Sends an S.I.E.F. form letter to the employer indicating the appropriate percentage of transfer.

   The Adjudicator must deliver the claim to the Section Stenographer to have this form sent out to the employer.

5. The "Special Information" section of the Form 711 used to outline special instructions must be completed by the Adjudicator when:

   a. S.I.E.F. is being applied to relieve the employer of costs for only part of the claim.

PROCEDURE: (cont.)

Amounts and/or dates for that period of relief are flagged on the Form 711.

b. a claim where S.I.E.F. has previously been applied and,

1) a change in the percentage of S.I.E.F. has been approved.
The Adjudicator will complete another 711 and indicate whether this application is an increase or decrease in percentage.

2) the claim is subsequently rejected.
That the claim has now been denied must be indicated by the Adjudicator on another Form 711.

Note: In both cases, the Adjudicator will have to advise the employer of the change in S.I.E.F. application.

Section	Subject
SECOND INJURY AND ENHANCEMENT FUND	PERMANENT DISABILITY

REFERENCES:

Section 108(2) of the Act.
Board Policies And Divisional Administrative Guidelines, Claims Services Division - Pages 242 to 245.
Exhibit #1 - S.I.E.F. Application to Employer Costs.
Basic Concepts, Document Number 33-28-01.

GENERAL INFORMATION:

1. The criteria as set out in the following categories are to be used for establishing the worker's award and for transfers to S.I.E.F. in all cases with respect to permanent disability. Where the extent of transfer to the S.I.E.F. is higher than 50%, the employer is to receive the benefit of such determination applied to all or part of the claim depending upon individual circumstances.

2. Measurable Prior Condition

   This category applies where the prior condition was measurable and the impairment of total body function resulting from the new disability is increased beyond the degree usually associated with such disability because of the prior condition.

   This situation occurs in cases such as prior amputation or loss of movement in which the pre-existing condition has been or could have been rated for permanent disability.

   In such cases, there are four aspects of evaluation:

   a. the value of the prior condition by itself,

   b. the value of the new condition by itself,

   c. the value of the entire disability,

   d. the enhancement factor (which is the value of the entire disability less the sum of the value of the prior and new condition).

   Formula: Enhancement Factor

   $$d = c - (a + b)$$

GENERAL INFORMATION: (cont.)

7. Other Prior Conditions - Application to Worker Award

This category applies where a prior condition is not measurable but enhances the residual disability from the accident. In cases where:

a. Condition producing minor pre-accident disability--award full assessment.

b. Condition producing moderate pre-accident disability--award 75% of total assessment.

c. Condition producing major pre-accident disability--award 50% of total assessment.

The following applies to points a, b and c above:

- No reduction should be made if the prior condition was the result of a prior compensable accident (unless an award for permanent disability was granted in a previous claim).

- Pre-existing psychological disability would be assessed in terms of the limitations shown in the work record and social integration of the worker that have been produced by mental illness and/or defects of personality.

- The significance of the pre-existing disability should be considered in terms of the likely clinical rating that would have been assessed if the pre-accident problem had been compensable, having regard to the range of disabilities usually encountered in such a condition.

- In exceptional cases where a strict application of the above would be unreasonable, an award based on a medical estimate of the actual disability that might have resulted from the accident may be recommended. Such cases would be rare and should always be discussed with the Permanent Disability Medical Consultant or other senior personnel.

GENERAL INFORMATION: (cont.)

8. Other Prior Conditions - Application to Employer Costs

Different factors can apply in recommending relief for the employer as compared to what is appropriate for determining the award for the worker. Consideration must be given to the medical significance of the pre-existing condition and the severity of the accident. See S.I.E.F. Application to Employer Costs, Exhibit #1, for the appropriate level of employer relief.

In addition, the following will also apply to Exhibit #1:

- The medical significance of a condition is to be assessed in terms of the extent that it makes the worker liable to develop disability of greater severity than a normal person. There need not be associated pre-existing disability that is visible.

- With psychological conditions the possibility of prior psychic trauma from life experience could be considered as evidence of vulnerability and justify recommending relief to the employer, even in the absence of pre-existing psychological impairment.

PROCEDURE:

1. At permanent disability review, the Pensions Adjudicator is responsible for evaluating the severity of accident, which is to be recorded by memo with supporting rationale and flagged in the Warning Section of the claim file jacket.

2. In determining the severity of the accident, the Pensions Adjudicator must have regard for all aspects of the history of accident including the mechanics, the body position, and the environment, in keeping with the approved definitions, without being influenced by the presence of pre-existing disability or condition or post-accident history.

3. The Pensions Adjudicator is to determine the extent of the pre-accident disability in keeping with the adjudication guidelines, or in consultation with the Pensions Medical Adviser, and records in the pensions interview memo the severity of the pre-accident disability along with supporting rationale.

   Information about prior history which may be obtained from the worker at the time of the pensions interview and details of employment history which may be obtained from the employer(s), plus

PROCEDURE: (cont.)

additional facts which may be contained in various reports on the file, should be recorded in that memo.

4. The Pensions Adjudicator then refers the file to the Pensions Medical Adviser for review, and to determine the medical significance of the pre-existing condition in terms of the extent that it has made the worker liable to develop disability of greater severity than a normal person, and to have that determination documented in the examination rating memo.

5. After the examination has been completed, and the Medical Adviser returns the file to the Pensions Adjudicator, the Pensions Adjudicator is to determine the percentage of relief of costs that should be granted to the employer, having regard for the decisions made in respect to the severity of the accident and the significance of the pre-existing condition. See Exhibit #1 for Application of Costs.

6. Where the extent of transfer is greater than that previously determined, the amended extent of relief may be applied to all or part of the claim, depending on individual circumstances, but where the extent of transfer is less than that determined at the time of initial adjudication, the amended extent of relief shall apply only to the capitalized value of the permanent disability awarded and costs processed subsequent to permanent disability evaluation.

7. In dealing with claims re-opened or reviewed subsequent to February 1, 1979, the Pensions Adjudicator makes a comparison between the effect of the application of the former policy (that is, Board Order of March 25, 1970) and the effect of the application of the new policy if it is to the advantage of the injured worker and/or employer.

8. Once the percentage and extent of S.I.E.F. relief has been determined by the Pensions Adjudicator, he then:

PROCEDURE: (cont.)

a. completes a separate Form 711 as well as indicating his title, i.e. Pensions Adjudicator, beside the signature in each case.

b. completes the "Special Information" section of the Form 711 outlining the special instructions where:

- the transfer is to be applied to only part of the capitalized value,
  e.g. The worker receives a permanent disability award for 2 injuries, a knee and the back, and S.I.E.F. applies only to the back.

OR

- the level of S.I.E.F. relief to the capitalized value is altered.
  The Pensions Adjudicator must complete another 711 showing whether it is an increase or a decrease in percentage.

9. The Pensions Adjudicator notifies the employer of any further decision made regarding the application of the Second Injury and Enhancement Fund, at the time that the permanent disability award is made.

10. At the time of the permanent disability interview the application of the Second Injury and Enhancement Fund Policy will be discussed with the worker and details confirmed in writing, by the Pensions Adjudicator.

11. For enquiries regarding the transferring of funds subsequent to the application of the Second Injury and Enhancement Fund, the Pensions Adjudicator should place a memo in the file and direct it to the Co-ordinator, Accident Cost Transfer.

S. I. E. F.

APPLICATION TO EMPLOYER COSTS

SEVERITY OF PRE-EXISTING CONDITION	SEVERITY OF ACCIDENT	% OF RELIEF TO EMPLOYER
Minor	Minor	50%
Minor	Moderate	25%
Minor	Major	0%
Moderate	Minor	75%
Moderate	Moderate	50%
Moderate	Major	25%
Major	Minor	90 - 100%
Major	Moderate	75%
Major	Major	50%

SEVERITY OF ACCIDENT: DEFINITIONS

Minor Accident - an accident expected to cause non-disabling or minor disabling injury with complete recovery.

Moderate Accident - an accident expected to cause disabling injury with permanent disability a possibility.

Major Accident - an accident expected to cause serious disability with permanent disability a probability.

October 21, 1983

Section	Subject
SECOND INJURY AND ENHANCEMENT FUND	OBJECTIONS

REFERENCES:

Section 108(2) of the Act.
Board Policies And Divisional Administrative Guidelines, Claims Services Division - Pages 236 to 245.
Basic Concepts, Document Number 33-28-01.

GENERAL INFORMATION:

1. If the employer requests application of the S.I.E.F and application can not be granted on the basis of no pre-existing condition, the Adjudicator sends a letter advising the employer of the restrictive decision, the reasons for denial along with the objection paragraph and the objection brochure.

   If an objection is received, the Adjudicator proceeds as outlined in APPEALS: Decision Review System, Document Number 33-03-01.

2. If the employer objects to the application of 50% relief on the premise that it does not adequately recognize the prolonging influence of a pre-existing condition, the Adjudicator confirms that a permanent disability is not evident, with the surgical consultant, and ensures that temporary benefits are closed prior to dealing with the issue. The employer must be advised of any delays in dealing with his objection.

3. If the existence of a permanent disability is possible, the issue should be held in abeyance until after pension rating and the employer advised. The issue should be highlighted in the pension referral memo. (See PERMANENT DISABILITY: Basic Concepts, Document Number 33-20-01.)

4. Once benefits are closed, if no permanent disability is evident, the Adjudicator reviews the claim file to determine the severity of the accident having regard for the history of accident, the mechanics, body position and environment. (See SECOND INJURY AND ENHANCEMENT FUND: Permanent Disability, Document Number 33-28-03.)

PROCEDURES

1. The Adjudicator refers a memo to the Team Co-ordinator and Section Medical Adviser describing the details of the accident and recommending how the severity of accident is to be defined. Reference should also be made to any pre-existing medical problem and documents on file which provide details of the condition. A medical opinion is requested regarding the severity of the pre-existing medical condition.

2. Once the severity of the accident and severity of the pre-existing condition are determined and the file returned, the Adjudicator determines the appropriate level of cost relief. (See SECOND INJURY AND ENHANCEMENT FUND: Permanent Disability, Exhibit #1, Document Number 33-28-03.)

3. If the percentage of relief is increased, the objection is considered satisfied and the Adjudicator advises the employer by letter.

4. If a subsequent objection is received or the percentage of relief is decreased or remains the same, the Adjudicator proceeds as outlined in APPEALS: Decision Review System, Document Number 33-03-01.

REFERENCES:

Section 108(2) of the Act.
Board Policies And Divisional Administrative Guidelines, Claims Services Division - Pages 175 to 175B.
Basic Concepts, Document Number 33-28-01.

GENERAL INFORMATION

Industrial Hearing Loss

1. In industries involving noise hazards, it is the practice of the Board to encourage employers to have qualified audiometric examinations as part of their pre-employment medical programme. In such cases, the S.I.E.F. is applicable and the employer will be charged only with costs arising from that portion of the deafness which is due to employment, the balance being charged to the Second Injury and Enhancement Fund.

   Where no pre-employment audiometric examination took place, the employer will be charged in ratio by years to the worker's total exposure employment, the balance being charged to the Second Injury and Enhancement Fund, based on the premise that prior noise exposure employment has caused some pre-existing hearing loss.

Vibration Induced White Finger Disease

2. In industries involving vibratory hazards, based on the history of prior employment exposure, the employer will be charged in ratio by years to the worker's total continuous exposure employment. The balance will be charged to the Second Injury and Enhancement Fund, on the premise that prior continuous exposure to high frequency, rapid acceleration vibratory tools contributes to the development of the disease.

SECTION 108-(2)

Directive 1. Guidelines For Claims Adjudication Involving Pre-Existing Conditions and Application Of The Second Injury and Enhancement Fund

ADJUDICATION OF CLAIMS INVOLVING PRE-EXISTING CONDITIONS

A) Temporary Disability:

A claim for a work injury involving a pre-existing condition may be allowed for the acute episode only and entitlement to payment of compensation ceases when the worker's condition has reached the pre-accident stage. In a claim where there was a pre-existing condition but the worker is symptom free at the time of the compensable accident, there is no limitation of benefits throughout the period of temporary disability.

Some claims may be allowed for a "once only repair" as in the case of a strangulated hernia or recurrent shoulder dislocation. Allowance of a claim on this basis recognizes that a compensable accident did occur but that the resulting treatment and period of disability were due, at least in in part, to the pre-existing condition.

If the period of disability as a result of the accident becomes prolonged due to the pre-existing condition, a portion of the compensation and medical aid costs may be transferred from the accident employer in Schedule 1 to the Second Injury and Enhancement Fund in accordance with the approved policy. There is no provision in the Act for such a Fund to apply to Schedule II employers.

B) Permanent Disability:

The presence of a pre-existing condition is reflected in any permanent disability award when the degree of residual disability found in such cases is increased owing to the underlying condition. Permanent disability awards to the worker and cost transfers from the accident employer (Schedule 1 only) are made in accordance with the approved criteria in the sections dealing with the aggravation of pre-existing conditions and Second Injury and Enhancement Fund application.

APPLICATION

The policy on aggravation of pre-existing conditions applies to both Schedule I and Schedule II claims in which:

1) a relationship is shown between an underlying condition and the degree of disability arising from the accident; and

2) the period of treatment and recuperation is prolonged due to an underlying condition; and/or

3) an increased degree of residual disability occurs over that usually found in such cases owing to the underlying condition.

Note: Both physical and psychological disabilities are included.

SECTION 108-(2)

The policy regarding cost transfers to S.I.E.F. applies to Schedule 1 employers only. Section 108-(2) provides the authority for the Board to create this special fund out of assessments paid by Schedule I employers.

The guidelines of the order are set out in several parts. Each part is shown separately and guides for cost transfer to S.I.E.F. are included. Part five (5.0) outlines when the decision to apply S.I.E.F. is determined.

1.0 DETERMINATION ON INITIAL ADJUDICATION

Claims in which there has been aggravation of a pre-existing condition are ones where there is evidence that the disability following accident has been enhanced because of the pre-existing condition.

1.1 Fifty percent (50%) of the cost of a claim (compensation and medical aid) shall be charged to S.I.E.F. where there has been aggravation of a pre-existing condition and where there is evidence that the disability following accident has been enhanced because of the pre-existing condition.

1.1.1 If an employer appeals for relief in excess of 50% as provided in paragraph 1.1, and a permanent disability is not evident, the degree of financial relief shall be reviewed again when the claim is closed. Appropriate relief shall be granted if warranted in keeping with paragraph 2.3.

1.2 The full cost of a claim (compensation and medical aid) is charged to the S.I.E.F. in the following types of no lost time and lost time claims:

1.2.1 Where the prior condition is the cause of the accident, for example, epilepsy.

1.2.2 Where the wearing of an artificial appliance (either compensable or non-compensable) is the cause of the accident.

1.2.3 Where a disabled person has been placed in industry through the Board's Vocational Rehabilitation Division and suffers an extension of the original disability through minor accident.

1.2.4 Where a worker suffers an accident during an on-the-job training programme sponsored by the Vocational Rehabilitation Division.

1.2.5 Where a worker suffers an accident in trade school or other type of formal training facility sponsored by the Vocational Rehabilitation Division.

Note: "Other type of formal training facility" may also include a Schedule II employer. Provided no wages are paid and no employer/employee relationship exists between the Schedule II training facility and the injured worker, injuries sustained by a worker participating in such a programme are charged to the accident employer with 100% S.I.E.F. relief.

July 22, 1983
D.A.G.

1.2.6 Where a disabled worker is participating in a training or assessment programme approved by the Vocational Rehabilitation Division and the worker's compensable disability is the sole cause of an accident to another worker of the training or assessing employer.

April 13, 1982
Bd. M. 4959 #10

2.0 DETERMINATION ON CONSIDERATION OF PERMANENT DISABILITY

The criteria as set out in the following categories are to be used for establishing the worker's award and for transfers to S.I.E.F. in all cases with respect to permanent disability. Where the extent of transfer to the S.I.E.F. is higher than 50%, the employer is to receive the benefit of such determination applied to all or part of the claim depending upon individual circumstances.

2.1 MEASURABLE PRIOR CONDITION

This category applies where the prior condition was measurable and the impairment of total body function resulting from the new disability is increased beyond the degree usually associated with such disability because of the prior condition.

This situation occurs in cases such as prior amputation or loss of movement in which the pre-existing condition has been or could have been rated for permanent disability.

In such cases, there are four aspects of evaluation:

2.1.1 the value of the prior condition by itself,

2.1.2 the value of the new condition by itself,

2.1.3 the value of the entire disability,

2.1.4 the enhancement factor is the value of the entire disability less the sum of the value of the prior and new condition.

Formula is 2.1.3 minus (2.1.1 plus 2.1.2)

a) Worker's award

In every case to which this section applies (except total loss of sight) the award for permanent disability shall be the sum of the value of the new condition by itself, 2.1.2, plus the enhancement factor 2.1.4.

Employer's financial relief:

S.I.E.F. shall be charged with the enhancement factor 2.1.4.

b) Worker award - total loss of sight:

In cases of total loss of sight or enucleation of an eye where the pre-existing disability was the loss of sight or enucleation of the other eye and for which no award has been made, the award shall be the total of 2.1.1 plus 2.1.2 plus 2.1.4.

(TOTAL LOSS OF SIGHT SHALL BE DEFINED AS ABSENCE OF SIGNIFICANT USEFUL VISION FOR OCCUPATIONAL PURPOSES)

Employer financial relief:

The charge to S.I.E.F. shall be the individual value of the prior condition plus the enhancement factor as in 2.1.1 and 2.1.4.

2.2 OTHER PRIOR CONDITIONS - APPLICATION TO WORKER AWARD

This category applies where a prior condition is not measurable but enhances the residual disability resulting from the accident.

2.2.1 Condition producing minor pre-accident disability -- award full assessment.

2.2.2 Condition producing moderate pre-accident disability -- award 75% of total assessment.

2.2.3 Condition producing major pre-accident disability -- award 50% of total assessment.

EXPLANATORY NOTES

The following applies to paragraphs 2.2.1 through 2.2.3.

a) No reduction should be made if the prior condition was the result of a prior compensable accident (unless 2.1 applies, i.e., an award for permanent disability was granted in a previous claim).

b) Pre-existing psychological disability would be assessed in terms of the limitations shown in the work record and social integration of the worker that have been produced by mental illness and/or defects of personality.

c) The significance of the pre-accident disability should be considered in terms of the likely clinical rating that would have been assessed if the pre-accident problem had been compensable, having regard to the range of disabilities usually encountered in such a condition.

SECTION 108-(2)

Examples:

Backs

A condition producing occasional brief periods of disability, but minor restrictions on employability pre-accident (0-10%) could be considered minor (2.2.1). If there had been moderate periods of disability and one or more surgical procedures (11% to 20%) it could be considered moderate (2.2.2). If there had been multiple prior surgical procedures or a condition that had been producing major periods of disability with marked restrictions on working capacity (over 20%) it could be considered major (2.2.3).

d) In exceptional cases where a strict application of the above would be unreasonable, an award based on a medical estimate of the actual disability that might have resulted from the accident may be recommended. Such cases would be rare and should always be discussed with the Permanent Disability Medical Consultant or other senior personnel.

Example:

Cases where there had been a very high pre-existing disability level that was only minimally aggravated by the work accident so that it would be quite unrealistic to consider that the accident had produced a disability that could be measured in any way proportionate to the overall disability, e.g., a fractured wrist producing a minor permanent impairment, in a limb that was paralyzed and of little use.

2.3 OTHER PRIOR CONDITIONS - APPLICATION TO EMPLOYER COSTS

Financial relief to the Schedule 1 employer is accomplished by the application of S.I.E.F., if indicated. Different factors can apply in recommending relief for the employer as compared to what is appropriate for determining the award for the worker. Consideration must be given to the medical significance of the pre-existing condition and the severity of the accident as appropriate under the following table:

2.3.1 Pre-existing condition of minor significance

minor accident	50% cost transfer
moderate accident	25% cost transfer
major accident	0% cost transfer

2.3.2 Pre-existing condition of moderate significance

minor accident	75% cost transfer
moderate accident	50% cost transfer
major accident	25% cost transfer

2.3.3 Pre-existing condition of major significance

minor accident	90 to 100% cost transfer
moderate accident	75% cost transfer
major accident	50% cost transfer

EXPLANATORY NOTES

The following applies to paragraphs 2.3.1 through 2.3.3.

a) The medical significance of a condition is to be assessed in terms of the extent that it makes the worker liable to develop disability of greater severity than a normal person. There need not be associated pre-existing disability as outlined in 2.2.

SECTION 108-(2)

Examples:

Asymptomatic spondylolysis demonstrated on x-ray (2.3.1).

Symptomatic degenerative disc disease with significant periods of disability (2.3.2). Also asymptomatic spondylolisthesis (2.3.2).

Diabetes with arterial disease resulting in loss of a limb (2.3.3).

(b) With psychological conditions the possibility of prior psychic trauma from life experience could be considered as evidence of vulnerability and justify recommending relief to the employer, even in the absence of pre-existing psychological impairment.

(c) Minor accident - an accident expected to cause non-disabling or minor disabling injury with complete recovery.

(d) Moderate accident - an accident expected to cause disabling injury with permanent disability a possibility.

(e) Major accident - an accident expected to cause serious disability with permanent disability a probability.

3.0 INDUSTRIAL DISEASES

3.1 INDUSTRIAL HEARING LOSS

In industries involving noise hazards, it is the practice of the Board to encourage employers to have qualified audiometric examinations as part of their pre-employment medical programme. In such cases, the S.I.E.F. is applicable and the employer will be charged only with costs arising from that portion of the deafness which is due to his employment, the balance being charged to the S.I.E.F. Where no pre-employment audiometric examination took place, the employer will be charged in ratio by years to the worker's total exposure employment, the balance being charged to the S.I.E.F., based on the premise that prior noise exposure employment has caused some pre-existing hearing loss.

3.2 VIBRATION INDUCED WHITE FINGER DISEASE

In industries involving vibratory hazards, based on the history of prior exposure employment, the employer will be charged in ratio by years to the worker's total continuous exposure employment. The balance will be charged to the S.I.E.F., on the premise that prior continuous exposure to high frequency, rapid acceleration vibratory tools contributes to the development of the disease.

4.0 COST TRANSFER

There shall be no minimum dollar value for transfer of costs to S.I.E.F.

SECTION 108-(2)

5.0 DECISION TO APPLY SECOND INJURY AND ENHANCEMENT FUND

5.1 FATAL CLAIMS

This decision is to be made at the time of adjudication.

5.2 LOST TIME AND PERMANENT DISABILITY CLAIMS

5.2.1 In claims coming under 1.0 the decision is to be made at the time of adjudication.

5.2.2 In all other claims, the decision is to be made at the time of adjudication or as soon as it is recognized that an aggravation factor is contributing to the costs of the claim.

6.0 NOTIFICATION TO EMPLOYER

The employer will be advised at the time of the decision. The actual cost transfer will be processed and details included in the employer's next monthly cost statement. Any subsequent cost transfers will be processed as the payments occur and appear on the employer's cost statement for the month in which the payments were made.

April 8, 1980
Bd. M. 4845 #13

Directive 2. PROCEDURAL GUIDELINES FOR APPLICATION OF THE SECOND INJURY AND ENHANCEMENT FUND (S.I.E.F.)

1. Decisions with respect to the application of S.I.E.F. shall be in keeping with paragraph 5 of the adjudication guidelines. (Note Directive 1 above).

2. The Claims Adjudicator must obtain the opinion of the Section Medical Adviser if it appears that:

   2.1 The prior condition is the cause of the accident - paragraph 1.2.1 of the adjudication guidelines. (Medical opinion is not necessary when the cause of accident is self-evident).

   2.2 There has been aggravation of a pre-existing condition.

   2.3 The pre-existing condition enhances or prolongs the period of disability - paragraph 5.2.2 of the adjudication guidelines.

3. Denial of a request for application of S.I.E.F. is to be referred to the Claims Review Branch.

4. Determination of severity of accident.

4.1 The Pensions Adjudicator is responsible for evaluating the severity of accident in keeping with paragraph 2.3 explanatory notes (c), (d), and (e) of the adjudication guidelines.

4.2 The severity of accident is to be recorded by memo with supporting rationale and flagged in the warning section of the claim file jacket.

4.2.1 The severity of accident is to be evaluated having regard for all aspects of the history of accident, e.g.:

(a) Mechanics.

Lift, push, pull, fall, blow, etcetera.

(b) Position.

Kneeling, standing, sitting, squatting, bent, etcetera.

(c) Environment.

Terrain, temperature, weather conditions, lighting, locality, etcetera.

and in keeping with the approved definitions.

minor accident - an accident expected to cause non-disabling or minor disabling injury with complete recovery.

moderate accident - an accident expected to cause disabling injury with permanent disability a possibility.

major accident - an accident expected to cause serious disability with permanent disability a probability.

4.2.2 The decision is not to be influenced by the presence of pre-existing disability or condition or post accident history.

5. Determination of severity of pre-accident disability.

5.1 The Pensions Adjudicator is to determine the extent of pre-accident disability in keeping with paragraph 2.2 of the adjudication guidelines or in consultation with the Pensions Medical Advisor, if indicated.

5.2 Information about prior history is to be obtained from the worker at the time of the pensions interview and details of employment history may be obtained from the employer(s), additional facts may be contained in the various reports on file, e.g.:

5.2.1 Consultation reports.

5.2.2 Board interview and/or examination memos.

5.2.3 Hospital and Rehabilitation Centre admission, treatment and discharge reports.

5.2.4 Information obtained by waiver, if indicated.

5.3 The Pensions Adjudicator is to record in the pensions interview memo the severity of pre-accident disability along with supporting rationale.

6. The Pensions Medical Adviser is to determine the medical significance of the pre-existing condition in terms of the extent that it makes the worker liable to develop disability of greater severity than a normal person in keeping with paragraph 2.3 of the adjudication guidelines.

6.1 This determination is to be included in the examination rating memo.

7. The Pensions Adjudicator is to determine the percentage relief to the employer by having regard to the decisions made in respect to the severity of the accident and the significance of the pre-existing condition in keeping with paragraph 2.3 of the adjudication guidelines.

8. Where the extent of transfer is greater than that determined at the time of initial adjudication, the amended extent of relief may be applied to all or part of the claim depending on individual circumstances.

8.1 Where the extent of transfer is less than that determined at the time of initial adjudication, the amended extent of relief shall apply only to the capitalized value of the permanent disability award and costs processed subsequent to permanent disability evaluation.

9. Claims processed on and after February 1, 1979.

9.1 The foregoing procedural guidelines apply to cases processed on and after February 1, 1979.

10. Claims processed for permanent disability awards and S.I.E.F. application prior to February 1, 1979, and such claims are re-opened or reviewed subsequent to February 1, 1979, are to be dealt with:

10.1 On the basis of the policy in effect prior to February 1, 1979, - Board's Order, March 25, 1970, with the new policy approved by the Board November 3, 1978, being applied if it is to the advantage of the injured worker and/or the employer.

10.2 Application to worker award.

10.2.1 Paragraph 10.1 shall apply to benefits payable from February 1, 1979.

10.3 Application to employer costs.

10.3.1 Paragraph 10.1 shall apply to permanent disability cases processed on and after February 1, 1979, except where paragraph 8.1 applies.

11. Notification to employer.

11.1 The Claims Adjudicator is to advise the employer at the time of decision (initial adjudication).

11.2 The Pensions Adjudicator is to advise the employer at the time the permanent disability award is made.

December 27, 1978
D.A.G.

Workmen's Compensation Board

Vocational Rehabilitation Division

Document Number 02-03-04

Section
Transportation

Subject
OCCASIONAL BASIS: ASSESSMENT/TRAINING (#10(b),pg.4956, March 9, 1982).

POLICY

Payment for, or reimbursement of transportation to a worker engaged in an approved assessment/training program to cover occasional visits home and return may be considered under the following conditions:

Eligibility

Programs in excess of one (1) month duration

Trips home and return on a once a month basis, will be authorized - normally during weekends, where:

- the assessment/training program is conducted at a site distant from the injured worker's principal residence and the injured worker has qualified for room and board allowance under Section 54 (R.S.O. 1980), and
- the program is in excess of one (1) month duration.

Under this provision, transportation will be paid at the equivalent cost of public transportation, where such is available and convenient, or at the prevailing rate per kilometer as approved by the Board.

Humanitarian Grounds

Transportation home by the most direct and expedient means, will be authorized when an urgent family situation is identified that requires the injured worker's presence at home.

Exceptions

Exceptions to the above will be considered on the merits of each individual case.

Special Note

Home or principal residence, for the purpose of this document, is considered to be the normal place of residence where the injured worker resided at the time the program and room and board allowances were approved.

ADMINISTRATIVE GUIDELINES

General

All authorizations and conditions for allowance of transportation - occasional, on a once a month basis during assessment/training programs in excess of one month must be fully documented and communicated to the injured worker in writing.

Authorization for transportation expenses on "humanitarian grounds" must be fully documented, communicated to the injured worker, and subsequently confirmed in writing. The assessor/trainer will be kept fully informed.

Where a Schedule 2 employer is involved, the Schedule 2 employer shall be advised in writing.

Where another Compensation Board or Commission is involved, the consent of the other Compensation Board or Commission shall be obtained.

Where an "urgent" family situation occurs at a site other than the principal residence, only the equivalent costs of transportation between the training site and the normal place of residence where the injured worker resided at the time the program and room and board allowance was approved, will be paid.

Relevant Factors

Payment of, or reimbursement of a transportation expense is subject to the following criteria, with the exception of the "humanitarian grounds" factor:

- o the injured worker is on an assessment/training program and has qualified for room and board allowance, and

- the request is in keeping with the time frame of once a month while on programs in excess of one (1) month, and

- the trips are made during weekends or scheduled breaks in instruction or training.

Special Note

When special leave is granted under "humanitarian grounds" reference should be made to policy document #4909 (#15), June 9, 1981, subsection 3 "Absences from an Assessment/Training Program for Non-Compensable Reasons".

02-05-02

KF 3615 .ZB38 1990a WCAT
Preliminary response to the
Workers' Compensation Board'

DATE	ISSUED TO

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